127-205

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 512. 213

THE MISSOURI PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

PATRICK MACKEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MARCH 25, 1885.

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1 In the Supreme Court of the State of Kansas.

Be it remembered that on the 30th day of August, 1884, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error and case made from the district court of the county of Atchison, which are in words and figures as follows, to wit:

2 *Petition in Error.*

In the Supreme Court of the State of Kansas.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiffs in Error,

vs.

PATRICK MACKEY, Defendant in Error.

The said Missouri Pacific Railway Company, plaintiff in error, complains of the said Patrick Mackey, defendant in error, for that the said Patrick Mackey, at the June term of the district court, A. D. 1884, for the county of Atchison, recovered a judgment by the consideration of said court against the said plaintiff in error in a certain action then pending in said court, wherein the said Patrick Mackey was plaintiff and the said The Missouri Pacific Railway Company was defendant, a copy of the record of the judgment [and] proceedings in which case, with the original case made, duly certified, is hereto attached, marked "A," and made a part of this petition.

And the said The Missouri Pacific Railway Company, plaintiff in error, avers that there is error in the said record and proceedings in this, to wit:

First. That the said court erred in the instructions given to the jury on the trial of said action.

Second. That the said court erred in refusing to give instructions which the said plaintiff in error prayed the said court to give.

Third. That the facts set forth in said amended petition are not sufficient in law to maintain the aforesaid action thereof against the said The Missouri Pacific Railway Company.

Fourth. That the said court erred in overruling motion of the Missouri Pacific Railway Company for judgment on the pleadings.

Fifth. That the said court erred in overruling the demurrer of the said The Missouri Pacific Railway Company to the evidence of said Patrick Mackey.

Sixth. That the said court erred in admitting the evidence of John Steele, to which the said plaintiff in error objected.

Seventh. That the said court erred in receiving incompetent and irrelevant evidence over the objections of the said plaintiff in error.

Eighth. That the said court erred in overruling the motion of said plaintiff in error for judgment on the findings of fact of the jury, the verdict of the jury to the contrary notwithstanding.

Ninth. That the said court erred in overruling the motion of the said The Missouri Pacific Railway Company for a new trial.

Tenth. That the said judgment was given for the said Patrick

Mackey, when it ought to have been given for the said The Missouri Pacific Railway Company, according to the law of the land.

3 The said "The Missouri Pacific Railway Company" therefore prays that the said judgment may be reversed, and the said plaintiff in error restored to all things it has lost by reason thereof.

EVEREST & WAGGNER,
Attorneys for Plaintiff in Error.

The undersigned, attorneys for Patrick Mackey, defendant in error, hereby waive the issuance and service of summons herein, and enter the appearance of the defendant in error.

THOMAS P. FENLON AND
JOHN C. TAMLINSON,
Attorneys for Defendant in Error.

Filed August 30, 1884.

C. J. BROWN,
Clerk Supreme Court.

4 In the District Court of Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

Case made.

Be it remembered that heretofore, to wit, on November 13th, A. D. 1883, the plaintiff duly filed in the above-entitled court his amended petition, which is in words and figures as follows, to wit:

Amended Petition.

In the District Court, Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendants.

And now in this case comes the said plaintiff, Patrick Mackey, and for cause of action against the said defendant, The Missouri Pacific Railway Company, says—

1. That now and at the time of the injuries hereinafter complained of the said defendant, The Missouri Pacific Railway Company, is and was a corporation duly organized and existing under and by virtue of law, and as such doing business as a railroad corporation in the State of Kansas, and operating its cars, locomotives, and engines, and those leased and controlled by it, over and upon its tracks and side tracks, and over and upon those leased and controlled by it in the State of Kansas, and in the city of Atchison, in said State, and adjacent thereto, together with the charge, control, and management of all property and appurtanances necessary to

the prosecution of its said business, and having in its employ for the purpose of so operating said road and prosecuting its said business a large number of persons as officers, agents, servants, and employees.

2. That on the 11th day of February, 1882, the said plaintiff was in the employ of the said defendant as fireman upon a locomotive engine propelled by steam, owned, operated, and controlled by said defendant, and at the time of said injury [was] in the performance of his duties upon the same; that said engine was what is known as a yard engine, and, together with the tender thereto attached, used to handle and move cars in the yards at Atchison, Kansas; and on the 11th day of February, 1882, while said plaintiff was upon the same, that said defendant, by its agents, officers, servants, and employees then and there present and assisting in the operation of said engines, trains, and cars hereinafter set forth, other than this plaintiff, by gross negligence and carelessness, wilfully [and] carelessly ran and caused to be run into said engine and tender, which had cars thereto attached, upon which plaintiff was employed, while the same was backing up, another switch engine or yard engine, the same being a locomotive engine propelled by steam, and with the tender and a large number of cars thereto attached, one Bergen being an engineer thereon, without giving any warning of its approach by ringing the bell, blowing the whistle, or in other manner; and while running at a dangerous and unusual rate of speed, and while there was no obstructions between said two engines, and during and about the middle of the day in the daytime, such two engines were run together and against each other, and collided with each other, and were run into and against each other in consequence of the negligence and mismanagement of the defendant, its agents, engineers, and employees then and there present and in charge and operation of said cars, engines, and trains other than this plaintiff; that the engineer and fellow servant of plaintiff on the engine on which he was employed, named Jesse Craft, was then and there guilty of gross negligence and mismanagement, and was then and there incompetent, and so known by defendant, its officers and agents, to be at the time of his employment, and retained by said defendant after his *employment* was so known, but such incompetency was unknown to plaintiff, and the said Craft then and there failed to look out for engines and obstructions on the track in the direction in which said engine on which plaintiff was then employed was moving, and negligently and carelessly failed to properly attend to his duties and manage his engine, and to use proper appliances to stop the same, and by reason of the gross negligence and mismanagement of the said Craft and Bergen, the engineer of, and the fireman and other employees of, the defendant upon the other engine, train, and cars attached thereto *other* than upon the one on which plaintiff was employed, and by reason of the negligence and failure of the fellow-servants of plaintiff other than the plaintiff in the management and operation of said two engines, trains, and cars attached thereto in not stopping said engine, train, and cars before they came together, and not keeping proper watch

on the engines, trains, and cars and obstructions on the track and giving proper warning and signals of danger and using proper efforts to prevent collision, and by reason of the gross negligence carelessness, and mismanagement of the said defendant and such incompetent officers, agents, engineers, and employees and servants, and plaintiff's fellow-servants at the time present and consisting of the engineers, firemen, brakeman, switchman, helpers, foreman, assistant foremen, yard-master, assistant yard-master, and all employees of defendant other than plaintiff then in charge of or operating said engines, cars, or trains, and by reason of the acts herein set forth, without fault or negligence on the part of this plaintiff, and while he was in exercise of ordinary care, he received the injuries hereinafter complained of.

3. That at the time the said engines with the cars thereto attached were run into each other the plaintiff was in the cab of the engine on which he was employed, which was headed west and, was slowly backing east while the other engine was coming from the east and struck the rear of the tender of the engine upon which plaintiff was employed and they struck each other and the truck of the same and forced the same forward in such a manner that plaintiff's leg was caught between the same and the brace in the cab, breaking, crushing, and wounding the same in such a manner and to such extent that it became necessary to amputate the same below the knee, which was done, and by reason of which said injuries plaintiff was for two months confined to his bed and put to great expense thereby, and suffered great pain and anguish of body and mind, and is still under the care of the physicians and surgeons, and by reason of such injuries plaintiff is crippled for life, and so permanently injured that from the effects thereof he will never recover; all of which said injuries were caused by the carelessness, gross negligence, and incompetence of the said defendant, its officers and employees and fellow-servants of plaintiff other than the plaintiff, as hereinbefore set forth and described.

6 4. That at the time of said injuries said plaintiff was a sound, healthy man, of the age of 39 years, and able to earn the sum of forty dollars per month, and his services were of that worth and value; that since said injuries plaintiff has been unable to perform any work, and never will obtain or be able to obtain employment at manual labor, and he has no trade or profession or other means of livelihood, except by his manual labor, and that by reason of the said acts of defendant, without his fault or negligence, as hereinbefore set forth, he has sustained damages in the sum of twenty thousand ($20,000.00) dollars.

Wherefore plaintiff asks judgment against the said defendant for the sum of twenty thousand (20,000.00) dollars and costs of suit.

TOMLINSON AND GRIFFIN,
Attorneys for Plaintiff.

And thereafter, on November 24th, 1883, the said defendant duly filed its answer to such amended petition of plaintiff, which answer is in words and figures as follows, to wit:

7 *Answer to Amended Petition.*

In the District Court of Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the said defendant, The Missouri Pacific Railway Company, and for answer to the amended petition filed herein, says:

First. That it denies each and every allegation, statement, and averment therein contained not hereinafter expressly admitted and confessed.

Second. Defendant further says that if the said plaintiff received any injury or damage, as alleged in his said petition, the same was the result of his own carelessness and negligence and his failure to exercise reasonable and ordinary care, and that such injury and damage was brought upon himself by his neglect and failure to discharge the duties incumbent upon him as such fireman in the employ of said defendant company.

Third. Defendant, for further answer, says that at the time of the alleged injury to said plaintiff he was a fireman employed by the defendant to work on a switch engine in the yards of said defendant company in the city of Atchison, and that in the discharge of his duties as such fireman it became and was necessary and imperative that he should at all times be on the lookout for obstructions upon the track in the direction in which the engine on which he was employed might be moving, and that at the time alleged in plaintiff's petitition that the said plaintiff was injured he, the said plaintiff, was not attending to such duties, but by reason of his carelessness, negligence, and inattention he permitted and caused the engine on which he was so employed to be run into another engine of this defendant company; that at said time said engine was being run by said Craft, as engineer, and said plaintiff, as fireman, and it then and there became the duty of the said plaintiff to keep a lookout in the direction in which such engine was moving, in order that the same might be properly managed and controlled by said engineer, who was then at said time engaged in receiving signals from the opposite direction in which said engine was running and in the discharge of his duty as such engineer; all of which was well known to said plaintiff at said time.

And defendant further says that said plaintiff had worked in and upon such engine for a long time prior thereto and well knew that the track and yards of said defendant at the place where said plaintiff was alleged to have been injured was in constant use by other employees of defendant company and in the running and operation of cars and trains thereon, and well knew that it was his duty to so conduct himself in the discharge of his duties as such fireman as to

prevent collisions and accidents, and disregarding such duties in the premises, and by reason of his carelessness and negligence, the collision, as alleged in plaintiff's petition, occurred, and not by reason of any fault or negligence of any fellow-servant of the said plaintiff or other person in the employ of the said defendant.

8 Fourth. Defendant further says that said plaintiff had for several months prior to the said accident worked with said Craft as such engineer, as also the other employees named and mentioned in plaintiff's said amended petition, and then well knew their qualifications for discharging the duties incumbent upon each said employee so named and specified in said amended petition, and worked with such employees without objection, and without claiming at any time that they or either of them were incompetent to discharge any duty incumbent upon them, and prior to the date alleged in plaintiff's petition on which he is claimed to have been injured, the said defendant had no notice or information of any kind from plaintiff or any other person that said named employees, or either or any of them, were incompetent to discharge their duties in their several departments, and all allegations in said petition to the contrary are untrue and without any foundation in fact.

Fifth. Defendant further says that it is not true, as alleged in plaintiff's petition, that he has been unable to perform manual labor since the said accident, but this defendant alleges and charges the fact to be that for many months after the said plaintiff had recovered from his alleged injuries he simulated incapacity to perform any manual labor, and, although having many opportunities, refused employment whereby he could earn exceeding $40.00 per month, and all pretences of any kind or nature by him made that he was unable to perform manual labor were without foundation in truth or fact.

Wherefore this defendant prays judgment for costs.

EVEREST AND WAGGENER,
Attorneys for Defendant.

And thereafter, on December 1st, 1883, the said plaintiff duly filed his reply to said answer of said defendant, which reply is in words and figures as follows, to wit:

Reply.

In the District Court of Atchison County, Kansas, Second Judicial District.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes said plaintiff, Patrick Mackey, by his attorneys, Tomlinson and Griffin, and for reply to the answer of the Missouri Pacific Railway Company filed herein says he denies the truth of each and every allegation, averment, and statement therein con-

tained that does not admit of the allegations and statements in plaintiff's petition, or that is inconsistent with the allegation- and averments therein contained,

Wherefore plaintiff asks judgment as in his petition prayed for.

TOMLINSON AND GRIFFIN,
Plaintiff's Attorneys.

9 The case on original petition, answer, reply, having been tried at a — term of court, and a verdict of $11,000.00 being rendered, was set aside on motion of defendant, and a new trial granted on account of error of law in the admission of improper testimony in the trial of the case.

And said case on the issue as so joined remained duly pending in said court until on the 15th day of June, 1884. The said defendant filed its motion for judgment in said case on the pleadings, for the reasons in said motion contained, which motion is in words and figures as follows, to wit:

Motion for Judgment.

District Court, Atchison County, Kansas.

PATRICK MACKEY, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes said defendant and moves the court for judgment in its favor on the pleadings herein for the following reasons, to wit:

1st. Because it is shown by the pleadings that all injuries received by the plaintiff was the result of his own negligence.

2nd. Because the allegation- of the petition show that said plaintiff was not injured by or through the negligence of the defendant, The Missouri Pacific Railway Company.

3rd. Because it appears from the petition that if plaintiff was injured as alleged such injuries were the result of the negligence of a fellow servant of the defendant, and the negligence of the plaintiff concurring at the time.

EVEREST AND WAGGNER,
Attorneys for Defendant.

Which motion being argued by counsel, and considered by the court, was by the court overruled, to which action and ruling of the court the said defendant at the time duly excepted.

And thereafter, on the 18th day of June, 1884, at the June term of said district court of Atchison county, Kansas, the said case came on for trial before a jury duly empanneled for the purpose of hearing the same, and the said plaintiff, in order to maintain the issue on his part, introduced the following evidence in order, to wit:

10 PATRICK MACKEY, sworn, testified on behalf of plaintiff as follows on direct examination:

Defendant objects to the introduction of any evidence under the petition on the ground it does not state facts sufficient to constitute

any cause of action, and because it is alleged whatever injuries the plaintiff may have sustained it is claimed to have been the result of the negligence of a fellow servant and employee.

Objection overruled. Defendant then and there duly excepting.

Q. What is your name?
A. Patrick Mackey.
Q. Are you the plaintiff in this action?
A. Yes, sir.
Q. Where do live?
A. 921 North 3rd street.
Q. In the city of Atchison?
A. Yes, sir.
Q. How long have you lived in Atchison county?
A. 13 years.
Q. What were you doing on the 11th day of February, 1882?
A. A fireman on an engine.
Q. What road?
A. On the old Central Branch, under the control of the Missouri Pacific.
Q. In whose employment were you at that time?
A. The Missouri Pacific's employment.
Q. How long had you been in their employ?
A. About four years.
Q. Fireman at that time?
A. Yes, sir.
Q. On what?
A. A switch engine—166.
Q. At what place?
A. In the yards at Atchison.
Q. Is there more than one yard at Atchison, Kansas?
A. Yes, sir.
Q. How many yards are there?
A. Known as three yards—the lower yards and the middle yards, or the house yards, either one, and the upper yards.
Q. Generally denominated as being upper and lower yards, are they not?
A. Yes, sir.
Q. What were these yards for?
A. Transferring cars.
Q. Transferring and loading cars?
A. Transferring and loading cars—loading cars and standing on side track.
Q. What was the switch engine used for?
A. Moving cars from one track to another—from one place to another.
Q. Who owned what is known as the upper and lower yards?
A. Under the Missouri Pacific management.
Q. Who was your engineer at the time, on the 11th of February, 1882?
A. Jesse Craft.

Q. Where did the engine 166 usually work?
A. In the upper yards.
Q. What engine usually worked in the lower yards?
A. 154.
Q. Who was the engineer on 154?
A. William Bergen.
Q. Who was the fireman?
11 A. James Reiley.
Q. How many men was usually connected with the management of each of these switch engines?

Objected to as not within the issues. Withdrawn.

Q. How many men were connected with the management of this switch engine and crew connected with these trains at that time?
A. At that time there were three brakemen on the train I was on beside me and the engineer.
Q. Please give their names?
A. Of the brakemen?
Q. The names of the three brakemen.
A. Thomas Cusack, Joe Elsworth, and John Nolan—I believe his name is John.
Q. Then the crew that belonged to 166 was composed of yourself and Mr. Craft and the brakemen just named?
A. Yes, sir.
Q. Who composed the crew connected with 154 and managing 154?
A. William Bergen, engineer; James Reiley, fireman; Joe Magee, Alf Spaulding.
Q. I believe you stated 154 worked in the lower yards?
A. Yes, sir; I don't recollect the names of the brakemen on there just now.
Q. You don't recollect the names of the brakemen on there?
A. No, sir; or who the other parties were.
Q. What were the boundaries of the upper yard—what is known as the upper yard?
A. It is generally considered the tracks lay in the upper yard, in place above——
Q. Can you connect the boundary by any street?
A. Any place above Tenth street.
Q. The tracks west of that is what is called the upper yards?
A. Yes, sir.
Q. And all tracks east of Tenth street is what you considered the middle yard or house yard?
A. Middle and lower yard, middle and house track.
Q. What was the boundary of the lower yard?
A. The boundary of the lower yard?
A. Yes, sir; by streets, if you please. What was the western boundary, known as the lower yard of the Missouri Pacific railway—the western boundary up and down about the depot?
A. Down to the river or east of that would be—east and south of that would be the lower yard.

Q. Who was the yard-master at that time?
A. General yard-master—Charles Wickham.
Q. Any more than one yard-master?
A. He had — foreman under him.
Q. Who was his foreman?
A. Joe Magee, on 154, and Thos. Cusack, on 166.
Q. Was there any other officers under Mr. Wickham in control of the yards except those named as foremen?
A. Not that I know of.
Q. They, then, had control; these foremen you have mentioned had control of the movement of the switch engines?
A. Yes, sir.
Q. Directed them where to proceed?
A. Yes, sir.
Q. What business did you say you were engaged in on the 11th of February, 1882?
12 A. Fireman on the switch engine.
Q. What was the switch engine doing that day?
A. Switching cars.
Q. In that place known as the upper yards?
A. In the upper yards; yes, sir.
Q. On what tracks were you at that time?
A. At the time of the injury?
Q. No, sir; during the forenoon?
A. Different tracks, different side tracks; I could not name them or place them all.
Q. Did any injury occur to you that day?
A. Yes, sir.
Q. What injury did you receive, if any?
A. I lost that leg, I believe; pretty sure I did.
Q. Don't you know whether you did or not?
A. I know I did.
Q. Lost that leg?
A. Yes, sir.
Q. What were you doing at the time you lost your leg?
A. Firing an engine.
Q. Firing an engine?
A. Yes, sir; No. 166.
Q. Now, just detail in your own way the facts connected with your injury there at that time, how it was done, and so forth, just at the time; state the whole transaction.
A. Just at the time I got hurt, at the time the engines ran together, I was putting in a fire in the engine, or about in the act of getting up at the time they struck, after shoveling coal out of the tender, being east of me here. I stood in about this shape shoveling coal in at the time, and had about got through putting in the coal, and about in the act of sitting down on the seat which was there for the purpose, the same as this chair is, [when] the collision took place. (Witness stood up and explained what he was doing.)
Q. What ran into you?
A. Engine 154 and engine 166 ran together.

Q. At what place was that?

A. That was known as east; it is east of the bridge, the first bridge east of the shops.

Q. Of the central branch shops?

A. Yes, sir.

Q. Where are the central branch shops?

A. Just east of the city.

Q. Just west adjoining the city of Atchison?

A. Yes, sir.

Q. Is that in the county of Atchison and State of Kansas?

A. Yes, sir.

Q. The yards where you were injured was what is known as the upper yards?

A. Yes, sir.

Q. What direction was this engine 154 that ran into 166 going?

A. West; she was going west.

Q. That is, the engine was headed west?

A. Yes, sir; and going west.

Q. What direction was your engine headed, the one you were on, 166?

A. Headed west.

Q. They were both headed west; which direction was yours moving?

A. East.

Q. And the tender was east of you?

13 A. Yes, sir.

Q. Between you and the engine that collided there?

A. Yes, sir.

Q. What struck the engine first, the tender first, which was east of you; what portion of the train that ran into you?

A. Engine 154.

Q. What was the result of the striking of the tender there at that time?

Objected to; withdrawn.

Q. What position did it put the tender in after it was struck, when the engine struck the tender?

A. It ran the tender of the engine I was on up into the car.

Q. In what manner did it affect you?

A. There was a brace in the cab of the engine I was in; runs upon the back of it to the boiler to heat the water. There were two braces, one on each side. I got my foot fast on this brace. The tender ran up on the cab.

Q. The tender was on top of it?

A. Yes, sir; as the tender ran up into the cab, ran up this brace about as far as it could go, some distance, and held my foot fast.

Q. How long were you held there?

A. I could not tell how long, until they slackened the other cars.

Q. Your leg was there?

A. Until the tender dropped back into its place after the slack left the cars.

Q. You say you were just in the act of sitting down?
A. I was about getting up from the fire-box after putting in a fire to go to sit down.
Q. What were you looking at just prior to the accident?
A. Prior to it I had just been putting in a fire.
Q. Were you looking at the fire-box?
A. Yes, sir.
Q. How long had you been putting in coal on the fire?
A. I could not state or give any time.
Q. As near as you can approximate.
A. Maybe a minute, maybe two.
Q. I understand you were facing west at the time you were putting in coal, at the time you were ran into?
A. Yes, sir.
Q. Engine 154 — ran into your train was coming from the east?
A. Yes, sir.
Q. On what track was that?
A. On the main track.
Q. The main track of the Missouri Pacific Railway Company?
A. Yes, sir.
Q. Had you any cars attached to the engine?
A. Yes, sir.
Q. How many?
A. I could not state the number that was attached to it; maybe four to six, maybe more.
Q. Where were you taking them to?
A. I could not say where we were taking them to. I suppose taking them, backing them down to get them on the side track?
Q. That was the engineer's and fireman's business to know where they were to be taken to?
A. The foreman's business.
Q. What track had you come off of in order to get on this main track?
A. Off the side track.
14 Q. How long had you been on that side track?
A. I could not say how long we had been working around there before that.
Q. You can't state how long?
A. No, sir; we might have been working there an hour, more or less.
Q. So the court and jury can understand this matter I will get you to explain. Is this the shops you speak of—about the location of the shops? (Showing witness diagram.)
A. Yes, sir.
Q. That is known as the Central Branch shops. This line ran in here. Is there some tracks down here?
A. Side tracks in here.
Q. Coming down from the shops to the main track?
A. Yes, sir.
Q. Is this the main line?
A. Yes, sir.

Q. How far is it from this bridge to the shop; how far?
A. I could not say the distance—four hundred feet—maybe 800 feet.
Q. How far east of the bridge was it where the injury occurred?
A. About 85 feet.
Q. Well now how far is it from where the injury occurred to Union street? This is Union street here.
A. 800 to 900 feet.
Q. Is there anything up there known as scale tracks?
A. Yes, sir.
Q. Where did they run from?
A. The scale track—house track—ran down from Union street.
Q. Well where did they connect with the main track you were on at the time—how far east or west—please explain—or the place of the accident?
A. East of the place of the accident.
Q. About how far was that switch?
A. About 500 feet.
Q. How far east of what is known as the bridge; what is the length of that bridge?
A. I don't know the length of the bridge.
Q. 40 or 50 feet?
A. Yes, sir.
Q. About 85 feet east of the bridge?
A. 85 feet, more or less.
Q. Now where had you been going just prior to the accident; had you been on that?

Objected to by defendant. Objection sustained.

Q. Now, Mr. Mackey, had you seen engine 154 before it ran into you that morning?

Objected to by defendant, because it assumes 154 ran into them. Withdrawn.

Q. Had you seen engine 154 before the collision occurred?
A. Not to my recollection. I did not see it that morning.
Q. Now state to the jury where you had been just prior to the time of the injury.
A. The engine had been on one of these side tracks known as the repair tracks.
Q. Where is that; which side of the main track?
A. North side of the main track.
Q. These repair tracks ran up to the shops?
A. Towards the shops or bridge.
15 Q. What had you been doing in there?
A. We went in there and took out some cars and turned them out on the main line.
Q. You went in to bring out some cars?
A. Yes, sir.
Q. Hitched on to some cars?
A. Yes, sir.

Q. Then you came out on the main track?

Objected to by defendant as leading. Withdrawn.

Q. State what you done.

A. Went in on the side track and hauled out some cars on the main line, and one of the brakemen cut some of them off after we got them out on the main line—I could not saw how many—and started to back up; to back east with the remainder of them; the cars was west of the engine; we were working the train ahead of them.

Q. You backed down then east?

A. Backed down to the place of the injury.

Q. Where were you intending to go at that time?

A. I suppose we were going in on the side track again—one of the side tracks we came out of.

Q. Did you hear any whistle or bell sounded or rung on engine 154 just prior to the injury?

A. Not until the time of the collision; I heard the whistle and collision about one time.

Q. Simultaneously?

A. I could not say which was first or last.

Q. Was there anything in this tender you speak of as being east of your engine? Was there any coal in that?

A. Yes, sir.

Q. How much coal was there. Was it full?

A. Pretty well filled; we generally carry a pretty good tank of coal.

Q. How did you fire the engine? Explain to the jury—that is, how did you put the coal in; stand up or get down?

A. Generally have to stand up off the seat where the fireman sits; break the coal if it requires it; if it don't require it shovel it in.

Q. Bending down to shovel it in?

A. Always leaning over as a general thing; get down about as low as a man can decently work shoveling in over the fire-box.

Q. While doing such work can you see an approaching engine?

A. Not unless I stood up there.

Q. Can you perform any other work while firing?

A. No, sir.

Q. Is it your business to fire the engine?

A. Yes, sir; that is what I was put there for.

Q. That is what you are put there for?

A. Yes, sir.

Q. That is your duty?

A. Yes, sir; that is my duty.

Q. Had you been ringing the bell before that; before you were firing?

A. Yes, sir; before I put a fire in.

Q. When you quit you were ringing the bell and went to firing?

A. I was watching for signals when they got the train to the last switch?

Q. Where were you watching for signals?

16 A. Watching west of where I last saw the brakesmen.

Q. Where did you last see the brakeman?

A. When he last cut these cars off on the main line.

Q. Which side was he?

A. On the south side.

Q. Which side does the fireman usually stand—what is his place in the engine?

A. Left-hand side.

Q. What is the place for the engineer?

A. Right-hand side.

Q. You say Elsworth was on the south side just before you went to put in coal?

A. Yes, sir; before I went to put in coal.

Q. Did you or not receive any signals from him?

A. He gave me the last signal I received.

Q. Where was the other men connected with your crew?

A. I don't know.

Q. Just prior to the accident?

A. I suppose they were on the other side of the engine; I could not say; one of them rode the cars up the main line; where the other one was I could not say.

Q. Was there any person on the train of cars you were pulling except yourself and the engineer?

A. Not that I know of.

Q. Any person else that you know of?

A. No, sir.

Q. Did you have any knowledge of the near approach of the train until it struck?

Objected to by defendant as leading. Objection overruled, defendant excepting.

A. I had no knowledge whatever until it struck.

Q. To what yard did the engine you were working on belong?

A. In the upper yard.

Q. Engine 154, that collided with yours—what yard did that belong?

A. In the lower yard.

Q. On that day where was the place 154 was doing business—on that day—and belonged to what yard? Do you know where 154 usually belonged and worked on that day?

A. She worked and belonged in the lower yard.

Q. Now, Mr. Mackey, what became of you? Can you state what you done—what was done with you after this tender—after your leg was fastened in the wreck there?

A. I had to helf myself out—I got off the engine.

Q. What did Craft do?

A. I could not say whether he jumped off or whether he was thrown off; he got off the engine; I did not see how he got off.

Q. What condition were the two engines in at and after the time of the accident; what did it result in?

A. The engine I was on I should say — consider it a total wreck for anybody to look at.

Q. Do you know how many cars there was attached to 154, if any, at the time of the collision?

A. Yes, sir.

Q. How many was there?

A. 14 cars—flat cars—loaded with coal, I kind of think, as I went by on a stretcher, or a door, rather.

Q. What was the condition of the track there—was it up or down grade or level grade?

17 A. About where they struck it is grade both ways—slight grade both ways where the engine struck, or about there.

Q. They were both going really down hill?

A. It would be considered down hill there from Union street west.

Q. What condition is the track—what is the grade east of where the collision occurred?

A. The track is perfectly straight.

Q. For what distance?

A. I could not say.

Q. About what distance?

A. A couple of thousand feet.

Q. A quarter of a mile, or such a matter?

A. Yes, sir; I guess a quarter of a mile.

Q. How fast was your train moving at the time of the accident, if moving at all—was your train and engine?

A. Well, as fast as a man could walk—maybe faster.

Q. About as fast as a man could walk?

A. Might have been faster.

Q. Well, what was done with you now—after this tender ran upon you you say you were taken away on a stretcher?

A. I staid up there; nobody came near me on the engine.

Q. What became of you?

A. Until I crawled out myself; after the slack left the cars got my foot out—got down and sat on the side track; James Riley was the first one came; noticed me, I believe.

Q. Then what was done?

A. He and some others came there and took me off on the door.

Q. Took you off on the door?

A. Yes, sir.

Q. Where did they take you to?

A. To my house.

Q. In Atchison here?

A. Yes, sir; they did not take me there; they took me down to Union street, and put me in a horse and buggy they had there of Doctor Ferguson's, and that took me to my house.

Q. Took you to where you live?

A. Yes, sir; took me on the door to Union street, and from Union street they took me in the buggy to my house.

Q. Was there anything or physician [to] do anything with your leg after that?

A. Not until I got home to my house they took it off.

Q. You were stating before dinner—before adjournment—what you were doing after you left the engine—after you received the injury. Now just state in your way where you were taken to—what was done with you.

A. As they took me off on the door from the engine to Union street—got in the buggy with Doctor Ferguson; he took me to my house.

Q. Took you to your house?

A. Yes, sir.

Q. Where was your leg hurt at that time?

A. The ankle and instep.

Q. Well, what physician attended you?

A. Doctor Holland.

Q. Was your leg afterwards amputated?

A. Yes, sir.

Q. When?

A. That same day.

Q. By whom?

18 A. Dr. Holland, in the course of a couple of hours.

Q. Was it amputated more than once?

A. No, sir.

Q. At the place where it is now cut off?

A. Only once.

Q. Is it so the jury can see where it was cut off?

A. Yes, sir.

Q. I wish you would show it.

(Witness shows his leg to the jury.)

Q. How long were you in bed after that was cut off?

A. Two months.

Q. Can you straighten that out?

A. I could get it out, but it is hard to do.

Q. How long was it healing up?

A. The doctor was treating me—waiting on it—for about four months.

Q. You say it was only amputated but one time?

A. Yes, sir.

Q. Who else was waiting there—any other physician?

A. No other physician but Doctor Holland.

Q. Did you have any nurse?

A. Yes, sir.

Q. Did any other physician assist him in the amputation?

A. Doctor Ferguson was there; I could not say whether he assisted him or not; I believe he did, to the best of my knowledge.

Q. State as to suffering—did you suffer any?

A. Yes, sir.

Q. For how long?

A. I might say I have been suffering since.

Q. How much have you suffered?

Objected to. Withdrawn.

Q. Is it at intervals; has the suffering been regular?

A. It has been continual, so far as sensation of the nerves.

Q. Do the changes of the weather affect you?

A. More or less.

Q. What has been the general condition of your health since then?

A. My health is good otherwise.

Q. How were you prior to the accident?

A. Health was good.

Q. How old were you at the time of the accident?

A. Going on thirty-nine years of age.

Q. What condition was your body in—were you sound?

A. Yes, sir.

Q. Had you any sickness before that?

A. No, sir.

Q. Always been an able healthy man?

A. Yes, sir.

Q. Did you have any nurse during your sickness?

A. Yes, sir.

Q. How long did you have a nurse; what amount did you pay for a nurse or owe for them?

A. I had when I could get them for two months.

Q. At what expense?

A. It would be hard to state the expense; the reason was portion of the time I could not get them for money, for the reason I did not have the money to pay them.

Q. What amount of wages were you receiving at the time you were injured?

A. $40.00 per month.

Q. You stated, I believe, that you were in the employ of the Missouri Pacific Railway Company at that time?

19 A. Yes, sir.

Q. Have you ever been paid anything on your claim?

A. No. sir.

Q. Never received anything?

A. No, sir; never received anything, only my wages?

Q. What time did you receive your wages up to?

A. Up to the time of the injury.

Q. None since?

A. None since whatever.

Cross-examination:

Q. How long had you been working for the defendant company in the capacity of fireman previous to Feb'y 11th, 1882?

A. Three to 4 months—about four months.

Q. In the yards in the city of Atchison?

A. Yes, sir.

Q. During the time you were so employed did your duties as such require you to be in the yards all this time—during the daytime I mean?

A. On the engine—wherever the engine went.

Q. Did you go up and down wherever the engine went? Did you go up and down through those yards many times each day?

A. More or less; yes, sir.

Q. Your business required you to travel almost continually [on] the engine up and down through the yards?

A. Yes, sir.

Q. Did you have occasion to go to the lower yards — daytime.

A. Sometimes.

Q. The business you were in sometimes required you to go to the lower yards?

A. Yes, sir.

Q. Your engine, or the engine you were at work on as fireman, staid in the upper yards most of the time?

A. Done principally all the work.

Q. Was there many tracks in that yard?

A. Yes, sir.

Q. Had trains been in the habit of passing to and fro over that main track frequently each day previous to the time of the injury?

A. Some.

Q. About how many trains or engines would pass over that track at the point of collision per day previous to the time you were injured?

A. Two trains came in off the road.

Q. Passenger?

A. No, sir; passenger went out in the daytime—12 o'clock.

Q. Passenger came in also?

A. Not in the daytime.

Q. Freight trains come in and go out?

A. Yes, sir.

Q. Yard engines worked to and fro over that track almost constantly, did not they?

A. Yes, sir.

Q. There was another yard engine—175—was there not?

A. Yes, sir.

Q. 154?

Answer. Yes, sir.

Q. And 166? Those engines worked up and down over this main line or track continually during the daytime and had during the time you had been there as fireman?

A. 154 did not work there continually.

Q. It worked there whenever it had work or business to take it there?

A. Yes, sir.

Q. It had the right to go there and pull cars there?

A. It did so; yes, sir.

Q. That was a part of the business; it was engaged in hauling cars from the lower yards to the upper yards and putting them on transfer tracks, was it not?

A. Yes, sir.

Q. At Union street there is a railroad crossing there, is there not?

A. Yes, sir.

Q. Cross- by teams?

A. Yes, sir.

Q. And footmen?

A. Yes, sir.

Q. The travel of the shop is over that street?

A. Yes, sir.

Q. At that time a good many people went up and down over that track at all hours of the day?

A. More or less.

Q. You had notice of that fact as fireman?

A. I have seen them.

Q. It was a very frequent occurrence for trains to pass up and down there and for persons to walk up and down the track, *for persons to walk up and down the track* and for persons crossing the track at Union street with teams and wagons?

A. Yes, sir.

Q. It was necessary, was it not, for you to be on the lookout most of the time to prevent accident?

A. I made it my business when I was not in anything else to be on the lookout.

Q. You understood it was your duty to be on the lookout to prevent accident, was it not?

A. To watch signals.

Q. You knew it required a great deal of caution up there in that locality to prevent accident?

A. Yes, sir.

Q. There was a bell on that engine?

A. Yes, sir.

Q. For what purpose is a bell used on an engine?

A. To ring at any time the engine is to be moved; a signal of danger or signal of moving the engine back or forth.

Q. The bell was set just above you, your position as fireman, was it not?

A. Yes, sir.

Q. Convenient for you to take hold of?

A. Yes, sir.

Q. What kind of bell—brass one usually—locomotive bell?

A. Yes, sir.

Q. The bell was in proper order that morning, so far as you know?

A. Yes, sir.

Q. You say that bell is used for the purpose of giving notice to employees in the yard and others of the movements of the engine?

A. Yes, sir.

Q. Movements to and fro through the yard, that is the purpose of the bell?

A. Ringing it principally on crossings.

Q. It is used for the purpose of giving notice of the motion of the engine to and fro through the yards?

A. More use at crossings.

21 Q. That is the purpose of the bell, to give notice to persons?

A. Yes, sir; on crossings.

Q. And elsewhere?

A. Yes, sir; when the engine is standing still and going to move.

Q. Was it not usual to ring the bell in that locality when not doing anything else? When you were not engaged in anything else, it was your custom to ring the bell?

A. If I wasn't doing anything else.

Q. That is what I say; if you were not doing anything else it is custom[ary] to ring the bell so as to give notice of the movement of the engine?

A. I generally ring the bell.

Q. Whose duty was it to ring that bell?

A. Fireman's duty.

Q. Any other person on the train have charge of the bell?

A. The engineer could ring it; sometimes he could ring it and would ring it where the fireman was engaged.

Q. It was the duty of the fireman to ring the bell when necessary?

A. Yes, sir.

Q. What kind of a day was it—the day of this injury to you—clear, bright day, or cloudy?

A. Bright day.

Q. You say the bridge—the track from the bridge down towards 10th street for about 2,000 feet is a straight track?

A. I could not say the distance exactly; about straight.

Q. 1,500 to 2,000 feet?

A. May be, more or less.

Q. A person could stand on the bridge up near the shop and see east from that or over that track for a distance of 1,000 to 2,000 feet?

A. Yes, sir.

Q. There was no obstruction there to prevent a person seeing down that track that distance standing on the track?

A. Persons standing on the track, if there would not be any obstruction.

Q. As I understand you, then, engine No. 166 was headed west?

A. Yes, sir.

Q. And cars attached to it were on the west end or at the head of the engine?

A. Yes, sir; west end headed on.

Q. As it moved east it would be backing, drawing these cars?

A. Yes, sir.

Q. Your position on the engine, you say, is on the left-hand side?

A. Yes, sir; south side then.

Q. And the engineer north side?

A. Yes, sir.

Q. During the time you were moving this engine to and fro in

the yards the engineer was in his proper position. Was he on the north side?

A. The engineer? I suppose that was his place.

Q. He was in his usual customary place?

A. When I last saw him he was in his seat.

Q. So far as you know, he was in his accustomed place attending to his duties, so far as you know?

A. Yes, sir.

Q. You say you went in on this repair track before you backed down?

A. Yes, sir.

Q. How many bridges was there there, between the point of collision and the shop?

22 A. One bridge.

Q. Where did this repair track connect with the main track; east or west of that bridge?

A. West of the bridge.

Q. How far west of the bridge?

A. I could not say what distance.

Q. Approximate it, if you please. How near was the intersection of the main track from the bridge.

A. Something less than 100 feet, I should judge.

Q. Did you ever measure it?

A. Yes, sir.

Q. You say that the collision occurred about 85 feet east of that bridge?

A. Yes, sir.

Q. About 85 feet east of the bridge?

A. Yes. sir.

Q. At the time you went in on this repair track you went there for the purpose of taking out some cars?

A. That is what we done.

Q. Did you take out some cars?

A. Yes, sir.

Q. How many.

A. I could not say how many.

Q. You pulled these cars down, then, until the engine passed over the bridge for the purpose of clearing the track and backing them west of the main track?

A. Yes, sir.

Q. In other words, you kicked them back up to the main track?

A. Yes, sir.

Q. How many?

A I could not say how many there was.

Q. How far west of the repair track, this intersection with the main track, did you go in order to get these cars back on the main track—that is to say, did your engine, 166, in going westward pass a point where the repair track intersected with the main track?

A. Yes, sir.

Q. How far west of that?

A. Passed it.

Q. About how far?
A. I could not state the distance exactly.
Q. Approximate it.
A. 300 feet or over.
Q. Then it stopped, did it not?
A. The engine stopped?
Q. Yes, sir; at a point about 300 feet west of where the repair track came into the main track it stopped necessarily in order to go east again, did it not?
A. Yes, sir.
Q. Then at the time your engine stopped there it would be about 400 feet west of the bridge, would it not?
A. Between 300 and 400 feet.
Q. If the bridge is 300 feet distant from the repair track—you were 300 feet west of the repair track intersection there—it would be 400 feet west of the bridge?
A. 3 to 400 feet.
Q. 4 to 500 feet west of the point of collision with 154?
A. I could not state the distance.
23 Q. If the collision occurred about 85 feet east of the bridge and the bridge is 100 feet east of the repair track, you were 300 feet west of the repair track; would that be between 4 and 500 feet?
A. Yes, sir.
Q. How many cars were cut off there after you had stopped west of the repair track?
A. I could not state how many cars.
Q. How many cars did you have after you had cut off some there?
A. I should judge 4 to six or eight cars.
Q. Were they empty cars or loaded?
A. I could not say they were loaded; some empty.
Q. Box or flat cars?
A. Box and flat cars, too.
Q. Box and flat cars?
A. Yes, sir.
Q. At that time who was on the train other than yourself and Craft, at the time you stopped up there to cut off those cars?
A. John Nolan.
Q. He rode the cars cut off back?
A. Rode them up.
Q. Now where was Elsworth at the time you stopped there?
A. He was on the south side.
Q. On the south side; did he then give you a signal?
A. He gave me a signal.
Q. What was that signal?
A. Back up.
Q. Back up?
A. Yes, sir.
Q. Go west or east?
A. East.
Q. To go east; then you mean by backing up he gave you a sig-

nal to move east to the reverse of the way the engine was headed—to the reverse of the way the engine was headed?

A. Yes, sir.

Q. How was that signal *was* given?

A. To back up; he started in to cut off the cars.

Q. Gave you a signal with his hands?

A. Yes, sir.

Q. Where was you at the time that signal was given?

A. I was on the seat-box.

Q. Looking west?

A. Yes, sir.

Q. What was your duty when you gave the signal?

A. To tell the engineer to back up.

Q. That was your duty?

A. Yes, sir.

Q. Did you then ring the bell?

A. Yes, sir.

Q. How often?

A. I could not say how often or how much.

Q. Did you give it more than one or two taps?

A. Yes, sir; gave it that many anyhow.

Q. Did you give it more than three taps?

A. I could not say whether one tap or two or three times; if I did not have anything to do — continually tapping it.

Q. When Ellsworth gave you this signal he disappeared between the cars?

A. Went in to cut them off.

24 Q. After he cut them off your train started off towards the east?

A. Back east.

Q. At the time you tapped this bell and received this signal did you look east of you down the track?

A. No, sir.

Q. What were you then doing immediately after tapping this bell?

A. I was still waiting for Elsworth to come back on that side to see the signal.

Q. Watching for Ellsworth to come back on that side?

A. Yes, sir.

Q. You did not look east at all?

A. No, sir.

Q. How far did you run while looking, sitting on that seat waiting for Elsworth to come back?

A. I could not say the exact distance.

Q. 100 feet?

A. Yes; all of that.

Q. How fast did you run from the time Elsworth cut the cars loose up to the time you ceased looking at him for signals?

A. I could not say exactly.

Q. As fast as a man would walk?

A. Might have been that fast.

Q. During all this time you continually looked west and not east?
A. Watching him for signals.
Q. What was the engineer doing while you were looking west?
A. I suppose he was watching for signals on the other side; only suppose so.
Q. Did you see him looking out?
A. He was on the seat-box.
Q. Sitting with his hand on the lever and throttle.
A. I would not say whether he had his hand on them or not.
Q. Sitting on the seat-box, he could see west of him?
A. Yes, sir.
Q. See persons on the north side of the train?
A. Yes, sir.
Q. You could do the same on the south side?
A. Yes, sir.
Q. Now, sitting there on that box on that seat, if you had turned and looked towards the east how far could you have seen down the track when you tapped that bell?
A. When I tapped that bell I could look pretty near down to—close to 10th street.
Q. You could have seen, then, for a distance of about 2,000 feet—1,500 to 2,000 feet?
A. Yes, sir.
Q. If there had been an engine on that track at that time you could have seen it?
A. If I looked that way. I did not look to see if there was any obstruction on the track.
Q. Did you look to see if there was any obstruction on that track at that time?
A. Nothing; only watching signals from Elsworth.
Q. You say Craft, the engineer, was watching signals on the north side [and] you were watching on the south side?
A. He was on the north side. I could not see whether he was watching signals.
25 Looking in that direction?
A. Yes, sir.
Q. Did you consider it the proper discharge of your duty at that time for each of you to be looking west and that train going east as fast as a man could walk?

Objected to by plaintiff. Objection sustained, defendant then and there duly excepting.

Q. Did you ring that bell any more after you started up there before the collision?
A. After I stopped ringing the bell I got down off the seat.
Q. Did you ring the bell any more after you tapped it up there when Elsworth gave you the signal before that collision?
A. I don't understand.
Q. I understand you to say at the time Elsworth gave you the signal to move back you gave the bell one, two, or three taps, maybe, more.

A. After Elsworth gave me the signal.

Q. You staid there on the other side watching him or watching for signals from him during the time the train had travelled something over 100 feet?

A. Yes, sir.

Q. Now, after you had given the taps of the bell you speak of, did you ring it any more before the collision?

A. Not to my knowledge. I got off the seat-box and put in a fire.

Q. Then you neither looked to the east nor did you ring the bell after that you now have any recollection of?

A. Not that I have any recollection of.

Q. Did the engineer ring the bell?

A. Not to my knowledge.

Q. Was the bell rung at all after that?

A. Not to my knowledge.

Q. Did the speed of that engine continue to increase right to the collision?

A. I could not say that it did.

Q. Did it increase?

A. Don't know as it did. It might about just before the collision.

Q. Did you notice any perceptible decrease of speed of that engine from the speed as fast as a man could walk before the collision?

A. Before the collision? I am of the opinion that it decreased in speed just before.

Q. How long before the collision?

A. I could not say how long.

Q. You are of the opinion it decreased just before. I will ask you, Mr. Mackey, if that is your signature or mark to that deposition?

A. Yes, sir.

Q. At the time this deposition was taken your recollection of this occurrence was better than it is now, was it not?

A. I don't know as it was.

Q. I will ask you if you did not testify in the deposition so taken on the fourth day of September, 1882, that the speed of your train continued to increase from the time it started when Elsworth gave the signal up to the collision?

A. Up to the time of the collision?

Q. Yes, sir. Didn't you testify before in this deposition that the speed of this train, in these words—wasn't this question asked you, did the speed of the engine continue to increase from the time you saw Elsworth until the collision, and you answered, yes, sir? Did you so testify?

26 A. Yes, sir.

Q. Is that a fact?

A. I suppose it could increase—have to increase the speed in order to get started from the time I seen Elsworth.

Q. I ask you the question if you did not testify the speed of the train continued to increase up to the collision?

A. It would increase.

Q. Then it is a fact it did increase—continue to increase?

A. Yes, sir; from the time I saw Ellsworth, in order to get started.

Q. It continued to increase right along up to the collision?

A. It was at a standstill when I saw Elsworth.

Q. It continued to increase from that time up to the collision?

A. Yes, sir; increased, I guess.

Q. Now, you say that after you had traveled east over some 100 to 150 feet you got off that box and put in a fire?

A. Yes, sir.

Q. How many shovels of coal did you put into that engine at that time?

A. Might have put in three or four.

Q. What do you usually put in when you fire up the engine?

A. Four or five shovels.

Q. Four or five shovels?

A. Yes, sir.

Q. That is done by reaching around the tender and throwing it into the fire?

A. Yes, sir; breaking up the coal.

Q. The coal was on that tender, was it not?

A. Yes, sir.

Q. So when you turned around to get the coal you would be facing east, the way the engine was moving, would you not?

A. When I turned around?

Q. Yes, sir; your back would be to the engine proper and your face to the east?

A. My back really would be south.

Q. Your back would be the south when you turned around to break coal?

A. No, sir.

Q. When you turned around to break coal you would be facing east?

A. Yes, sir.

Q. Then, if you had looked when you turned around in that direction—if you had looked down that track—you could see any obstruction on that track?

A. If I had stood up.

Q. If you had stood up in the cab and looked down the track you could see any obstruction?

A. If I had stood up and looked down the track I could have seen.

Q. What did you do first after you left the seat; did you break coal or put in coal?

A. Broke coal and put it in.

Q. Which did you do first?

A. Broke and put it in.

Q. Which did you do first?

A. Broke it first.

Q. After you broke it you put it in?

A. Yes, sir.

Q. Every time you turned around to take up a shovel of coal your face would be east?

A. Yes, sir; if I stood up.

27 Q. You were not squatting down all the time you were breaking coal?

A. Would be bent over.

Q. You straightened up during that time?

A. Not to my knowledge.

Q. How long would it take you to break three or four shovels of coal and put it in—how many seconds?

A. Sometimes it takes longer than it would other times.

Q. How long did it take you at that time?

A. I could not say *possibly*.

Q. You had traveled 100 feet, about, while sitting on your seat; then, according to your measurement, you had 385 to travel before the collision?

A. Something about that.

Q. Now, during the time you traveled this 385 feet about how fast was your engine moving—as fast as a man could walk?

A. I should judge about that.

Q. There was no occasion for you to look out for signals west of you after that?

A. Yes, sir.

Q. Did you look?

A. Yes, sir.

Q. You continued to put in fire and break coal and look out for signals?

A. No, sir; put in fire first.

Q. As you put it in you looked west again?

A. I got through putting in coal; I looked west the first thing; I aimed to do so—look west for Elsworth.

Q. Now, while you were putting in coal did you notice Engineer Craft?

A. I know he was sitting on the seat box.

Q. Didn't you notice he was looking west for signals?

A. I did not notice whether he was looking west or not; I could not say whether he was looking west or not; I thought he was.

Q. You thought he was at that time; then [the] appearances to you at [that] time was, he was looking west; did he have his hand on the lever and throttle, as usual?

A. I could not say.

Q. You do at that time say he was looking west for signals, but you could not say for sure whether he was or not?

A. I suppose he was.

Q. He did not look east at all—the way you were going?

A. No, sir.

Q. You supposed all the time he was looking west; you knew the train was moving east, didn't you?

A. I knew the train was moving east.

Q. You did not look east a single time, or after you saw Elsworth, until the collision?

A. After I quit watching Elsworth I did not look east.
Q. So far as you know the engineer did not?
A. I don't know whether he did or not.
Q. There would have been no difficulty whatever in your looking east; you could have glanced that way momentarily and still put in coal?
A. Not without I quit putting in coal—not very handy.
Q. You could not have glanced up and down the track as you broke coal?
A. The fireman don't generally do it.
Q. You could have done it without any difficulty?
A. I could have done it.
Q. While you were sitting on this seat traveling 100 feet
28 there would have been no difficulty of your glancing east over that track?
A. I could have looked that way.
Q. Did you put on the brake there at any time?
A. No, sir; the brake did not work; I believe not; not in the habit of putting on the brake.
Q. How long had you known that fact?
A. It did not work when I went on there.
Q. You had no use for the brake?
A. Never used it at all.
Q. Had Craft been engineer with you on that engine all the time?
A. About all the time; part of the time.
Q. What length of the time?
A. About three months, more or less.
Q. What experience had you as fireman when you went on there?
A. Not any more than being around engines—around the round-house.
Q. Never had been on an engine before that time as a fireman or engineer?
A. No, sir.
Q. Simply worked around the engines in the yard?
A. Yes, sir.
A. About what time in the day did this collision occur?
A. About 11 o'clock.
Q. You saw Elsworth no more after he disappeared between the cars east of the bridge, did you—I mean before the collision?
A. West of the bridge.
Q. You did not see him any more after that—after he crossed—or after he gave you the signal to back up east you saw no more of him before the collision?
A. No, sir.
Q. What is the condition of the ground there on the south side of that track; is there any deep gully?
A. Right at the bridge—maybe 10 or 15 feet of the bridge.
Q. There is a creek or ravine?
A. For that distance, 10 or 15 feet; maybe more.
Q. Now, I understand you to say in your examination-in-chief that the track declined there both ways—I mean to the east and

west—so that engine 166 would be going up hill, and 154 also up hill or down hill; which was it?

A. The track inclines both ways just about that place in there.

Q. I will ask you if a car loosened at the shops will not run of its own momentum or motion from there to the bridge?

A. Yes, sir.

Q. Then it is down grade, is it not?

A. Yes, sir.

Q. All the way from the shops to the bridge?

A. Yes, sir; also from Union street just below the bridge a car will run west from Union street to the bridge standing without a brake.

Q. It is about on a level at the place of collision?

A. It is an incline from Union street for the creek to run.

Q. From Union street west?

A. Yes, sir; was at that time.

Q. You did not see engine 154 at all until after the collision?

A. No, sir; not that day to my knowledge.

Q. Just before the collision you did not look in that direction at all?

A. I did not say so.

29 Q. You were confined to your bed how long?

A. Two months.

Q. At the time of the accident you were receiving $40 per month?

A. Yes, sir.

Q. Had you ever received anything — than that per month during your life?

A. Yes, sir.

Q. When?

A. Been some time before that.

Q. How long before? How much per month?

A. In 1865, 1866, 1867, and 1868. After the war I received more than that.

Q. How much?

A. $65 to $90 per month.

Q. Doing what?

A. Working in woolen mill.

Q. After 1870 what was the highest wages you ever received?

A. After 1870 $42 to $43.

Q. From $40 to $43?

A. $44; sometimes as high as that.

Q. You were confined to your bed for two months after the accident?

A. Yes, sir.

Q. What wages are you receiving now?

A. Not any that I know of.

Q. Have you been at work in the last three or four months as watchman?

A. No, sir.

Q. Down at the depot?

A. I watched there three or four days.

Q. How much a day?

A. When I did watch I got a dollar for it; three or four days; maybe five days.

Q. What other work have you done since you were injured?

A. Sawed wood in the winter time.

Q. How much per day would you make at that?

A. I would not consider I would make much at that.

Q. I ask you the question how much did you make per day; when you did work how much could you earn a day sawing wood?

A. Forty to sixty cents some days.

Q. What other work have you done since then?

A. Not any.

Q. Have you tried to get work?

A. Yes, sir.

Q. From whom?

A. Any place I could get it.

Q. All you have done then is to saw wood and work a few days as watchman?

A. Yes, sir; that is all.

Q. You feel perfectly able to do work—physically I mean?

A. I could not say I would be able to do work.

Q. I understand your general health is good and has been?

A. Yes, sir.

Q. The only injury or effect that you feel is the loss of that leg?

A. I have not been able to work at laboring work?

Q. By reason of the loss of your leg?

A. Yes, sir.

Q. Your general health is unimpaired and you feel as stout as before the injury except the loss of your leg?

30 A. And the pain at present.

Q. I ask you as to your general health. You feel as strong and healthy otherwise—I mean physically?

A. My health is good; I guess I don't consider myself as strong.

Q. You have not been confined to your bed only for about two months?

A. Two months.

Q. Since then you have been down around town every day?

A. Days that I could get out.

Q. Days you were out of bed?

A. Yes, sir; days which were pleasant I could get out.

Q. How many days did you serve as watchman there?

A. Three or four, maybe; I could not state exactly.

Q. You got a dollar a day for that?

A. Yes, sir.

Q. Up to what time did you work in that capacity?

A. They were odd days, now and again, so I could not keep track or any record of them; I could not say.

Redirect examination:

Q. Was there anything to call your attention to any other train coming from the East at the time of this collision or just before it?

A. Not until the time of the collision.

Q. It was your duty to watch out for signals from this side and to fire?

Objected to by defendant as not proper re-examination. Objection sustained.

Q. Mr. Waggener asked you about your duty to ring the bell. You mean when you were not firing?

Objected to as leading. Question withdrawn.

Q. What do you mean when you say it was your duty to ring the bell?

A. My duty to ring the bell when I was not doing anything else.

Q. At this particular time what was you doing?

A. When I wasn't ringing the bell I was putting in a fire.

Q. What did you do when you quit ringing the bell?

A. Got down off the seat box and put in a fire.

Q. When you were down putting in a fire what position were you in?

A. Stooped over generally as a man is.

Q. Could you in that position, with the tender east of you, see any other approaching train?

A. No, sir.

Q. State how much coal there was in the tender.

A. Generally piled up.

Q. How much was it at that time?

A. Piled up; generally three to five tons on the tender.

Q. At that time you say it was piled up so you could not see. State what condition the coal was in; how much.

A. The coal in the tender would naturally prevent me from seeing approaching trains.

Q. Was the coal above or below the tender?

A. Above the rim of—as a general thing, other rubbish and coal up there.

Q. Was there anything for a quarter of a mile east of where the collision occurred to prevent 154, the approaching engine, seeing your engine?

Objected to by defendant. Question withdrawn.

31 Q. Was there anything there between the place where the collision occurred and a quarter of a mile east of that point?

Objected to by defendant as not proper re-examination and calling for the opinion of the witness. Question withdrawn.

Q. Was there any obstruction on the track between the point where the injury occurred and a quarter of a mile east of that?

A. Not anything that I know of; only the tank and coal which was there.

Q. Was it a straight track?

A. Straight track.

Q. Was there any other engine or cars on that track, except engine 154, that you know of?

A. Not that I know of.
Q. You say it was a straight track?
A. Yes, sir.
[Q.] Then there was no obstruction in the way; was there any train due at that time—the time you were switching there—any regular passenger train?
A. No, sir.
Q. At the time of the collision, or just before that, did you have any notice or warning of any approaching train?
A. None whatever.

Recross-examination:

Q. You stated, in reply to Mr. Tomlinson's question, as a general thing, coal was piled up above the rim of the tender?
A. Yes, sir.
Q. You say the coal on that day was above the tender?
A. Was usually.
Q. Was it that day?
A. That would be, to the best of my opinion; it was that day; I am satisfied it was.
Q. You knew it was in the way of your seeing unless you stood straight?
A. It would be in the way.
Q. You knew that was there at that time?
A. Yes, sir.
Q. You knew it would be necessary for you to stand up straight in order to see obstruction- on the track?
A. Yes, sir.
Q. You did not stand up straight to look?
A. No, sir.
Q. You knew it was a great deal more dangerous to take an engine down that way, with the tank and coal up in front of you than to have the engine reversed and go the other way?
A. I did not think it was any more dangerous.
Q. You considered it just as safe to back the engine down there with the coal and tank between you and the track as to turn and go the other way?
A. Just about the same way.
Q. You made no effort, notwithstanding you knew the coal was piled up—you made no effort to look beyond and see what was on the track?
A. No, sir.
Q. You say, in reply to Mr. Tomlinson, as soon as you quit ringing the bell you went to putting in a fire?
A. Yes, sir.
Q. Didn't I understand you to state, in cross-examination, you traveled about 100 feet watching Elsworth before you could have put in a fire?
A. Rang the bell and watched Elsworth.
Q. Did you ring the bell during the entire time you traveled 100 feet?

32

A. I could not say what length of time.

Q. Were you ringing the bell all the time you were watching Elsworth?

A. I could not say.

Q. Didn't you swear in your deposition on the former trial of this case you only gave two taps of that bell just as you started?

A. Yes, sir.

Q. Would it require the length of time it takes the engine to go 100 feet, going no faster than a man could walk, to give that bell two or three taps?

A. It would require that time.

Q. As a matter of fact, you were not ringing the bill all the time you were watching Ellsworth?

A. I could not say whether I was all the time.

Q. Will you say you gave that bell over three taps?

A. I would not be positive; I rang it more than that.

Q. What is your best recollection now about it?

A. I might have rang it more or less; I could not say positive.

Q. Did you ring the bell at all after you had received a signal from Elsworth, and just as you started?

A. I am positive I rang the bell.

Q. Just as you received the signal?

A. Yes, sir.

Q. After that you did not ring it any more?

A. I could not say I did.

Q. I will ask you if you know you did not, if you did not so testify before—testify in this deposition—you only gave the bell one or two taps when it started, and you rang it no more?

A. I don't know as I did ring it any more.

Redirect examination:

Q. Your engine was the only one working up there at that time?

Objected to by defendant. Question withdrawn.

Q. Was there any other engine working in the yard as switch engine, except this, on that day or before that.

A. There was no other engine went up?

Q. Did any other engine belong in that yard except your engine?

A. That engine was the one usually called to work there in that yard.

Q. Did you expect any other engine on that day?

Objected to by defendant. Sustained.

33 W. A. FERGUSON, sworn, testified on behalf of plaintiff as follows on direct examination:

Q. What is your name?

A. W. A. Ferguson.

Q. What is your business?

A. Physician and surgeon.

Q. How long have you been a practicing physician and surgeon?
A. Over four years.
Q. Where do you reside now?
A. Atchison, Kansas.
Q. Where did you reside on the 11th of February, 1882?
A. Atchison, Kansas.
Q. What business and profession were you engaged in then?
A. The business I have stated.
Q. Do you remember of a collision occurring on the 11th of February in what is known as the Missouri Pacific yards, in west Atchison?
A. Yes, sir.
Q. Where were you at the time?
A. I happened to be passing by at the time.
Q. How far were you from the place where the collision occurred?
A. I was on the south side of White Clay creek, going across the track at Union street.
Q. About what distance was it?
A. About three or four blocks, I suppose.
Q. Do you remember the train; you say you remember of the trains coming together?
A. Yes, sir.
Q. Did you see the train moving from the east, and one from the west; did you see them moving up; how far before the collision did you see that train—the train running west from the east?
A. Well, I saw it crossing the crossing.
Q. Where is that crossing—what street?
A. Union street.
Q. What rate of speed was it running about that time?
A. I could not say exactly just how fast it was going.
Q. Pretty lively speed?
A. Yes, sir; it may have been going faster than I have stated; I suppose about five or six miles an hour.
Q. You say you saw the collision—when they came together?
A. No, sir; I did not see them come together.
Q. Did you hear the crash?
A. Yes, sir.
Q. Did you hear any whistle blow before that time from the engine going west, before the time of the collision?
A. Not to my knowledge; I don't remember of hearing it.
Q. What distance—you say about three blocks?
A. Yes, sir; near that. I was on the other side of the track; there was some trees between me and the train on the west. I saw the train coming from the east to the west. I could see it until I got down in the bed of the creek; then I could not see it.
Q. What was the result of that crash?
A. I came up over the hill. I saw—I looked at the engines; I saw a car, I thought was a flat car, over one of the engines, and just then I saw Mr. Mackey—it proved to be Mackey—coming down; they were helping him down out of the engine.
34 Q. What were the cars loaded with?

A. I saw coal fall off the eastern train.
Q. The train going west?
A. When the jar occurred it threw the coal off the side; I saw it dropping down on the track.
Q. Did you see Mackey after the accident?
A. I told them to put him in my buggy; I drove him up home.
Q. What condition was his leg in?
A. It was smashed and crushed.
Q. Bleeding?
A. Yes, sir.
Q. Crushed where?
A. The lower part of his leg.
Q. Do you know what was done with his leg after that?
A. Yes, sir; I assisted in the amputation.
Q. How long after?
A. The same day.
Q. Was amputation necessary?
A. Yes, sir.
Q. You say you have had experience as a physician and surgeon?
A. Yes, sir; I have had considerable experience.
Q. Have you seen Mackey's leg lately?
A. Yes, sir.
Q. Can you state to the jury from your knowledge of such matters what the effect of such an amputation will be on his general health hereafter?
A. He has what is called degeneration of the nerves of the stump. There is a muscular contraction—what is called a reflex action—from this nervous degeneration; the leg is drawn quickly into motion if he is sleeping, or comes on him suddenly, liable to wake him up out of sleep, or it may grow in time.
Q. Will climatic changes affect him?
A. Yes, sir; they do influence it.
Q. Any other effect on his general health?
A. The nervous system, of course; he suffers with it; it has a tendency to wear on the nervous system.
Q. How?
A. It has a tendency to wear on the system.
Q. You say that; I understand you about his nervous system—nervous functions; it would affect his nerves?
A. Yes, sir.
Q. It will?
A. It does now; it is what is called degeneration of the stump.
Q. Will that tend to decrease or increase as he grows older?
A. It is liable to increase, or he is liable to be troubled with it all his life.
Q. State whether he is any more liable to disease or not?
A. Not unless [it] gradually wears him out; it might interfere with his sleep; in that way tend to break him down.
Q. I understand you to say that the pain will last during his lifetime?
A. It is liable to.

Q. Did I understand you to say when you got around where you could see the train that a flat car or something was on top of the engine?

A. It looked that way to me—shoved up perpendicular—not quite perpendicular.

Q. You refer to the engine Mackey was taken off there?

A. I could not say which one it was.

35 Cross-examination:

Q. Taking into consideration the fact that after the expiration of two years and three months from this injury, that Mackey's general health is good, would you say that he is liable to be affected by this injury the rest of his life?

A. The stump is liable to trouble him.

Q. But if there had or would have been any very serious effect on his general health it would have developed ere this?

A. It may develop partially; I never saw or knew the man until the day of the accident.

Q. Take a hypothetical case: suppose his general health is as good now as it was previous to the accident, would you say there was a probability in the future of his general health being affected after the expiration of two years and a half?

A. It might result.

Q. Would it not—would there not be some indication of it in his general health?

A. Yes, sir; I don't think he looks as well as when I saw him.

Q. That is when you saw him at the time of the injury?

A. Yes, sir; just at the time of the injury.

Q. What difference do you see in his general appearance?

A. He don't look to me as fleshy as he did at that time.

Q. Is not that to a certain extent imagination?

A. I would not be positive.

Q. You have not examined him with reference to that?

A. No, sir.

Q. Casually looked at him?

A. Yes, sir; that is all.

Q. Now, in regard to this collision: at the time you saw this train coming from the east going towards the west, you were some three or four blocks distant—White Clay creek may have been between you and the train?

A. I was on the south side of the creek.

Q. So you had but a momentarily glance of the train until you were out of sight?

A. Then I went up on the other side.

Q. At that time was the engine of this train moving from the east near the crossing of Union street?

A. It was in the neighborhood of the crossing; I could not say positive.

Q. You say it was moving, as near as you could judge from this momentary glance, five or six miles an hour?

A. The engine was between the crossing and the bridge.
Q. When the accident occurred?
A. Yes, sir; gone over the crossing.
Q. It had gone over the crossing?
A. Yes, sir.
Q. Positive of that?
A. I would not say positive I saw the engine at all; I saw the train.
Q. I will ask you to state if on the former examination you did not testify at the time you noticed this the engine was just at the crossing of Union street?
A. It may have been a little over the crossing.
Q. I will ask you if you had such a view of that train as would enable you to now give any correct estimate as to the speed?
A. I could not say I was an expert.
Q. How many seconds did you notice it?
A. I could not say how many seconds I did notice it; I did not see much of it.
36 Q. You went down in the ravine?
A. Yes, sir.
Q. When you came up the collision had occurred?
A. I heard the crash.
Q. While you were down in the valley?
A. Yes, sir.

D. J. HOLLAND, sworn, testified on behalf of plaintiff as follows on direct examination:

Q. What profession or business are you in?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Near nine years.
Q. Where do you reside?
A. Atchison, Kansas.
Q. Are you acquainted with Mackey?
A. I am.
Q. Did you know him on or about the 11th day of February, 1882?
A. I did.
Q. Did you know of him receiving an injury on that day?
A. I do.
Q. Do you know where it occurred?
A. I don't know just exactly where it occurred.
Q. Did you see him during the day?
A. About ten or eleven o'clock—something of that sort—maybe a little later.
Q. Where was he when you called to see him?
A. At his house.
Q. In this city?
A. Yes, sir.
Q. You say he was at his house?
A. Yes, sir.
Q. What condition did you find his limb?

A. I found his right foot crushed above the ankle.
Q. What was the nature of the injury?
A. It was a mashed wound, caused by being mashed or crushed.
Q. Was there a bone broken?
A. Yes, sir.
Q. What condition was he in at that time?
A. He was in a feeble, prostrated condition at that time from the loss of blood and nervous shock.
Q. Had it bled much?
A. I imagined it had.
Q. What did you do with Mackey, as a physician, then?
A. I waited until reaction took place, until he was strong enough to bear amputation, and then amputated the limb.
Q. You amputated his limb; was it necessary?
A. Yes, sir.
Q. Has there been more than one amputation?
A. There was one amputation; after he progressed further along there had been an opening in regard to a portion of dead bone.
Q. Have you been his attending physician since?
A. Yes, sir; I believe I have.
Q. What has been the condition of his health since?
A. His health is not so strong.
Q. How has he been, so far as physical pain?
A. Not what I would consider a strong man; the stump
37 is unduly sensitive on account of the inflammatory action of the nerve, causing the surrounding muscles to be very sensitive; that is, the nerve being sensitive, that causes the muscles to contract, and when a person is asleep, suffering as Mackey does, he is liable to start in his sleep, because by the contraction of the muscles there is a constant irritation of the nerves.
Q. How is it liable to affect him hereafter?
A. It is liable to continue to affect him until he has some further surgical proceeding.
Q. Is he liable to suffer pain hereafter?
A. Yes, sir; until that is done.
Q. What will probably be the condition of his nervous system?

Objected to by defendant as improper. Question withdrawn.

Q. Will it affect his nervous system hereafter?

Objected to. Withdrawn.

Q. What effect will it have on his nerves hereafter—will the amputation, such as you have made, and as he sustained, and as is necessary here?
A. There is a certain amount of risks that he will have to undergo to have a secondary amputation. He has got to undergo the same risk almost that he would have had at the first amputation. The risks are he is liable to have the same condition of affairs existing in the nerves after — depends on the condition of the flap. Amputation at all times is dangerous.
Q. Have you seen Mr. Mackey's leg lately?

A. Yes, sir.

Q. Doctor, can Mr. Mackey, from the present condition of his leg, be able to wear a cork leg?

A. Not in the condition it is now.

Q. Explain to the jury why he cannot; can't you show the jury from the leg itself? I don't fully understand myself.

A. You can see by the probable condition and nature of the stump, because the end of the nerve had to be cut off when the limb was cut off; that is always at the end of the bony matter, making the end of the bone thicker; the bony matter thrown out making the end of the bone thicker. For instance, the end of the stump of the bone from there in proportion [is] thicker than here, and forms kind of a round mass at the end of the bone, and this nerve comes right down in that. Inflammatory action existing in the nerve exists at the end bone also, and the muscles and the nerve, being rigid there, gives an involuntary contraction of the muscles on pressure coming against the end of the stump, and an artificial limb don't always rest on the end of the stump, but it is the shape of the limb, tapering down this way, and it is held in this way and supported also by the knee; when that does that way — draw the muscles up, and drawing the muscles up makes this more tender at the end—at this end.

Q. You don't think it would be practical at the present condition of the leg to wear a cork leg?

Objected to by defendant. Question withdrawn.

Q. He was confined to his bed?

A. Yes, sir.

Q. How long was he confined to his bed?

A. He was confined to his bed about seven or eight weeks; I don't remember which; he was confined to his bed about all the time; then he was confined to his house some time; I don't recollect just exactly the length of time, probably two months would cover it.

38 Q. What are the reasonable charges for attending him as a physician and surgeon—services you rendered him as a physician as the result from this injury?

A. I think Mr. Mackey's bill is about 290 dollars; something of that sort.

Q. Is that amount due you?

A. Yes, sir.

Cross-examination:

Q. You say his general health is not strong?

A. No, sir.

Q. Who would be the best judge of that, the physician casually observing him or *him*self?

A. I think the physician's judgment in regard to watching his patient—I think he is a pretty good judge to tell whether his patient looks feeble, whether he is suffering from nervous shock.

Q. How long since you have treated him?

A. He has consulted me off and on probably once a month; I have seen him and talked about his condition.

Q. When did you prescribe for him last?

A. I don't think I have prescribed for him for about a year—that is, what you would call a prescription. I have given him advice.

Q. The present condition of his limb as to tenderness—you say that that would require another amputation in order that he might wear an artificial limb?

A. It will.

Q. What is the cause of the present tenderness where it was amputated before—is it the necessary result of that injury?

A. Allow me to explain that. Where a person has a chance to amputate a limb from sound tissue—when a man is hurt in a railroad accident no surgeon, no matter how competent he may be, can tell how far the condition of the flesh — of tissues exists—to go to work and amputate a man's limb at his knee for an injury at his ankle joint would be contrary to good surgery. Any man regarded as a physician and surgeon has got to exercise his judgment to know about where that sound tissue exists to make the amputation in his judgment. Many times in railroad surgery you can't do it and make the flap, as you may think, perfectly sound and healthy, which has to be done at the time.

Dr. W. W. COCHRAN, sworn, testified on behalf of plaintiff as follows:

Direct examination:

Q. Where do you reside?

A. City of Atchison.

Q. What is your business or profession?

A. Physician and surgeon.

Q. How long have you been a practising physician and surgeon?

A. Over 30 years.

Q. Are you acquainted with Mackey?

A. Yes, sir.

Q. Have you seen his leg lately?

A. Yes, sir.

Q. When did you examine it last?

A. Yesterday.

Q. Please state, from your knowledge as a physician and surgeon, what effect such an amputation will have on his general health and condition of his health hereafter.

A. It would [so] affect his vigor of health or nervous tone of the system as to make him more liable to take on another disease.

39 Q. What necessarily will be the result on his nervous condition?

(Objected to by defendant. Question withdrawn.)

Q. What effect has the amputation such as you know to have been made on Mr. Mackey upon your examination *is likely to have* upon his nervous system?

A. I judge from the condition of that leg—I concluded on a close examination—he will have pain there for such time or at such time as may injure his general health by deranging his nervous tone, so he is more liable to the changeable effect of the atmosphere or any other disease—perfect health at times and at other times he will be more susceptible to taking cold or contagious diseases, affecting him that way, and he may go for a long time without being affected; he may be affected very soon.

Q. Will climatic changes affect him in any respect?

A. Yes, sir; to a greater extent than a healthy man.

Q. So far as pain is concerned, how will it affect him?

A. So far as the pain — pain so deranges the nervous system as to destroy his general vigor of health. In that condition he is much more liable to atmospheric changes than he would be if he was in robust health and had no pain.

Q. State whether or not he is liable to suffer any pain hereafter.

A. Yes, sir—continual pain—continue to suffer pain at different times.

Q. What effect will it have on his rest, if any?

A. He may lose a good deal of rest at times.

Q. From your examination of this leg of Mr. Mackey's do you think he will be able to wear a cork leg?

A. I think not, sir; have to be a very ingenious man to do it.

Q. Would amputation be necessary in order to do it?

A. Yes, sir; I think it would be.

Q. Would that amputation be attended with any other danger?

A. Not any more than any other amputation. All amputations are dangerous. It might be a little more because of his nervous system being deranged than if he was in a robust, healthy condition.

Q. You think he could not wear a cork leg.

Objected to by defendant.

Cross-examination:

Q. You testified once before in this case, a year or so ago?

A. I have a remote recollection of something of that kind.

Q. Didn't you in the former trial of this case testify that the effect of this upon Mackey's health for the next two years would be such as to make him a very desirable patient for a doctor?

A. I don't recollect; I might have done so.

Q. Didn't you say you would be glad to have such a patient for two years, who would require constant attention of a physician?

A. I have forgotten. I say so now.

Q. Then, if he has not required constant attention of [a] physician the last two years at all you were somewhat mistaken?

A. No sir; I would say he had not met with them, the atmospheric changes, not met with them, [the] diseases that would have made him a good patient.

Q. We have had various atmospheric changes in the last two years.

A. Yes, sir; but he might not have been affected by it—if he would be caught out in the rain.

Q. If he had been in the habit of walking around the street and suffered no effect your theory as to the result of this injury is somewhat exploded?

A. No, sir; not at all times.

Q. Now, if his general health has not been affected the last two years your theory of two years ago as to the effect of this would be somewhat exploded.

A. No, sir.

Q. What do you think his general health for the next two years will be?

A. I think he is liable to put in the next twenty years suffering.

Q. You think it will have a depressing effect?

[A. ——]

JAMES REILLEY, sworn, testified on behalf of plaintiff as follows:

Direct examination:

Q. Where do you now live?

A. Atchison, Kansas.

Q. What business are you engaged in?

A. At present in the printing business; compositor on the Champion.

Q. What were you doing on the 11th of February, 1882?

A. Fireman on a switch engine.

Q. What place?

A. In Atchison.

Q. What company were you working for?

A. Missouri Pacific Railway Company.

Q. Missouri Pacific Railway Company?

A. Yes, sir.

Q. What engine were you firing on?

A. 154.

Q. What was engine 154 used for?

A. Switching purposes—moving cars about in the yards.

Q. In what yards?

A. Lower yards.

Q. State how many yards there was at Atchison, Kansas.

A. There was two or three; it might be said two—the upper and lower yards.

Q. One known as the upper and the other as the lower yard?

A. Yes, sir.

Q. Where did 154, the engine you were on, usually work—where did she belong?

A. In the lower yard.

Q. How far is the lower yard from the upper yard?

A. It is a mile, I should judge.

Q. One on the river, the other west of [the] town?

A. Yes, sir.

Q. Where did 166 work at that time?

A. She was working in the upper yard.
Q. What was the business of that engine?
A. Switching cars.
Q. Where did she belong?
A. In the upper yard.
Q. Who was the engineer on 154 that morning?
A. William Bergen.
Q. Do you remember Mr. Mackey being injured on that day?
A. Yes, sir.
Q. Where was he injured?
A. In the upper yard.
Q. What is known as the upper Missouri Pacific yards?
A. Yes, sir.
Q. In this county and State?
A. Yes, sir.
Q. Whereabouts—how was Mackey injured?
41 A. His foot was crushed.
Q. What happened?
A. A collision happened.
Q. What was the collision between?
A. Between two switch engines.
Q. What two engines?
A. 166 and 154.
Q. What engine was Mackey on?
A. 166.
Q. You were on 154?
A. Yes, sir.
Q. What direction was your engine moving that day?
A. Going westward.
Q. Did she have any cars attached to it?
A. Yes, sir.
Q. How many?
A. It had 13, I think, or 14.
Q. What were they loaded with, if anything?
A. Coal.
Q. Where was she brought from?
A. The lower yard.
Q. What portion of the lower yard?
A. Below the Union depot.
Q. Where was she being taken to?
A. The upper yards.
Q. What portion of the upper yards?
A. That I don't know; to be taken and put on the side track.
Q. You, as fireman, did not know?
A. No, sir.
Q. What is the condition of the track where the collision occurred; is it level or up or down grade?
A. It is on a little incline west, I think, where it occurred—that is, the way we were going was inclined west a little bit of a decline—I should say on a decline the way we were going.
Q. That is, declining to the west?
A. Yes, sir.

By Mr. WAGGENER:

Q. Do you mean to say it is down grade?

A. Yes, sir.

Q. Mr. Tomlinson, with reference to the Central Branch shops, where did this injury occur?

A. Just east of the Central Branch shops—I should judge 300 yards or more than that; I could not state with accuracy

Q. Was there a bridge between the place where the accident occurred and the Central Branch shops?

A. Yes, sir.

Q. Is there a creek there?

A. Yes, sir.

Q. What creek is it?

A. White Clay creek.

Q. Is there a bridge spans that?

A. Yes, sir.

Q. Was it east or west of that bridge the accident occurred?

A. East of the bridge.

Q. How far?

A. Probably 90 or 100 feet.

Q. Is that track east of where the accident occurred? What is the condition of the track as to being straight or crooked east of the point where the accident occurred?

42 A. Perfectly straight.

Q. For what distance?

A. For a good distance, quarter of a mile—that is, from the accident eastward; more than that westward.

Q. Who was connected with your train when you went up that morning?

A. Bergen as engineer, Joe Magee as foreman of the engine, Mr. Spaulding as brakeman, and myself.

Q. Who had charge of the train?

A. Mr. Magee.

Q. Did you see 166, the one that Mackey was on, before the collision occurred?

A. Yes, sir; I did.

Q. How far were you from it when you saw it?

A. At this quarter-of-a-mile switch; I saw them from the time we came up this straight track a quarter of a mile.

Q. What were they doing?

A. Switching back and forth on this repair tracks west of the bridge; backed out over the bridge; backed forward; they moved back and forward two or three times.

Q. What rate of speed was the train you were on going when you first sent it?

A. Four or five miles an hour.

Q. What rate of speed were you going or moving when you crossed Union street?

A. About four miles I should judge.

Q. How far is Union street from the place where the injury occurred?

A. Not over 300 yards—1,000 feet most.

Q. What rate of speed were you running at the time you came together?

A. Hard to tell; I don't think over two or three miles an hour.

Q. How did engine 154, [which] you were on, strike—what portion of the engine 166 did it strike?

A. At the rear end of the tank.

Q. What was the result of the striking of that tender?

A. The collision shoved the tank up on the cab of 166.

Q. Where Mackey was?

A. Yes, sir; where he was and his engineer.

Q. What was the result of that?

A. Demolished things generally.

Q. Injured Mackey?

A. Yes, sir; so resulted.

Q. In what way?

A. His foot was crushed when I saw him after the collision.

Q. Did you blow any whistle or ring any bell before the collision?

A. I did not blow any whistle.

Q. Did Bergen?

A. Yes, sir.

Q. How long before?

A. A very short time before the collision.

Q. As much as two seconds?

A. Yes, sir; two or three seconds.

Q. Were you right close up to it?

A. Yes, sir.

Q. You say it was two or three seconds between the blowing of the whistle and the time of the collision?

A. Yes, sir.

Q. Was the bell rung.

A. Not on 154.

Q. 154 was the one you were on?

43 A. Yes, sir; it was not rung.

Q. What kind of a whistle was this given—a loud whistle?

A. Yes, sir; one blast of the whistle.

Q. Were you as much as one car length between them at the time of the whistle?

A. More than that—I should judge two or three car lengths.

Q. You say it was two or three seconds?

A. Yes, sir.

Q. It was almost simultaneous?

A. Yes, sir.

Q. With the collision?

A. Yes, sir; two or three seconds after the whistle.

Q. I understand you to say there was two or three car lengths between you?

A. Yes, sir.

Q. A few seconds after that?

A. Yes, sir.
Q. You say it is a mile from the lower yard to the upper yard?
A. Yes, sir.
Q. Did you know engine 166 was working up in the yard that morning?
A. No, sir.
Q. You knew she belonged up there?
A. Yes, sir.
Q. You knew she was up there?
A. No, sir; not positive.
Q. You knew there is where she worked?
A. Yes, sir.
Q. Was there any whistle blown by Mr. Bergen from the time you left the lower yard until you got to the upper yard at the time of the collision?
A. No, sir.
Q. You say it was a straight track for a quarter of a mile east of the point where the collision occurred?
A. Yes, sir.
Q. Was there any brakeman on the train at the time of the injury?
A. I could not state.
Q. Was there any brakes applied?
A. Not to my knowledge.
Q. If there had been any would you have known it?
A. I might have felt the jar or slack of the train.
Q. Was steam shut off—anything of that kind?
A. I think it was.
Q. At the time of the whistle?
A. I think it was.
Q. Whistled and shut off steam at the same time?
A. Yes, sir.
Q. That was about two or three seconds before the collision?
A. Yes, sir.
Q. Did you see Mr. Craft, engineer on 166, and Mr. Mackey on that as fireman before you came upon them at the time of the collision?
A. No, sir.
Q. As you went up to them you saw the engine coming down toward you, did you not?
A. Yes, sir.
Q. Was it moving toward you?
A. Yes, sir.
Q. As you went up?
44 A. Yes, sir.
Q. Did Bergen see this?
A. I suppose he did; I was looking forward and not looking at him.
Q. Did he have any other business when he was running except watching for signals or not?
A. No, sir.
Q. Was he looking any direction?

A. I wasn't looking at him—I could not state—I was looking ahead.

Q. Was there any trains back of you that you were having signals from or men?

A. No, sir.

Q. Was there any other train or engine—any obstruction of any kind—between the time you first saw engine 166, upon which Mackey was on, and the point of collision?

A. I think not; no, sir; there was not.

Q. It was a straight track?

A. Yes, sir.

Q. Do you know where the brakeman was at the time of the injury?

A. No, sir.

Q. Do you know whether any of them was on the car or train?

A. They were when we started.

Q. You don't know whether they were afterward?

A. No, sir.

Q. Had the brakes been applied, and the steam shut off, and your train, 154, been stopped?

(Objected to by the defendant. Question withdrawn.)

Q. How long have you been a fireman? How long were you before that?

A. Over five months; near six months.

Q. Where had you been firing?

A. In these yards I have mentioned.

Q. You say you don't know where these cars were taken or being taken to?

A. No, sir; I mean to say by that I don't know where they were going to be placed; they were taken to the upper yard.

Cross-examination:

Q. What time in the day was this accident?

A. Between eleven and twelve o'clock.

Mr. TOMLINSON: Did you call Bergen's attention to that train being there?

A. I did.

Q. Did you tell him to do anything?

A. I told him to whistle at them.

Q. He did not whistle until after you told him?

A. At the same instant the whistle was blown.

Cross-examination resumed:

Mr. WAGNER:

Q. Between eleven and twelve o'clock you say?

A. Yes, sir.

Q. What kind of a day?

A. Very bright day—sun shining.

Q. As you moved up that track on that day how many cars were attached to your engine—being drawn by it?
A. About thirteen.
Q. Loaded cars?
A. Yes, sir.
Q. Loaded with what?
A. Coal.
Q. Heavy or light train?
45 A. Heavy train.
Q. Up to what point is it up grade from Sixth street west?
A. From Sixth street to Tenth street; to the scale house west of Tenth street, about a block and a half.
Q. It is up grade there?
A. Yes, sir.
Q. From there to the point of collision?
A. No, sir; I say to Union street it is up grade; then I think there is a little decline.
Q. Towards the west?
A. Yes, sir.
Q. You had thirteen cars loaded with coal pulling west?
A. Yes, sir.
Q. To take them up there to some of these side tracks?
A. Yes, sir.
Q. As you moved up that track going west you say this engine 166 moved backward on the side tracks?
A. Yes, sir.
Q. What, if any, notice had you that [that] engine was to back down on the main track?
A. No more than they were working in from the main track, in on the side track.
Q. At the time you crossed Union street your train was going about four miles an hour?
A. Yes, sir.
Q. Is that considered slow or fast?
A. It is not fast; it is below the yard rules.
Q. Below the yard rules?
A. Yes, sir.
Q. Was Bergen during this time in his proper position on the engine?
A. Yes, sir.
Q. That is, the right side?
A. Yes, sir.
Q. At the time you noticed this 166 coming down, at the time the danger became apparent to you, about how fast was 166 moving?
A. I could not state that with accuracy—the speed of that engine.
Q. Approximate, considering the result what you saw there.
A. They must have been moving four or five miles an hour.
Q. Were they not moving faster than that?
A. It may be possible.
Q. At the time of the collision, I will ask you if any effort was made to check that train at all which came in collision with yours?

A. I could not say; not that I saw.
Q. No effort so far as you know?
A. No, sir.
Q. At the time you saw that engine coming down it became apparent there was danger; you say you notified the engineer?
A. I made that remark.
Q. And immediately the whistle was sounded, was it?
A. Yes, sir.
Q. How many sounds?
A. One.
Q. What is that signal?
A. Danger signal; calls for breaks.
Q. Who is that signal to?
A. Brakemen, generally; anybody connected with the business.
Q. In the yards?
A. Yes, sir.
Q. Signal for all persons to look out?
A. Generally considered so.
46 Q. Immediately on giving that signal state whether or not he reversed his engine?
A. I could not state whether he reversed the engine or not?
Q. I will ask you if on the former trial of this case you did not state he reversed his engine and gave her steam?
A. I may have said that; it is clear out of my recollection now.
Q. Didn't you state then—what then did he do?
A. I heard the whistle sounded, — was the last.
Q. Reversing the engine has what effect?
A. Reversing the engine stops the train.
Q. Did he do so?
A. Yes, sir; I believe he did reverse the engine.
Q. What effect, or — was the effect of reversing that engine?
A. It did not stop us.
Q. You say it was moving at the time of the collision about two miles an hour?
A. Yes, sir.
Q. How much slower could that engine move, and move at all, than two miles an hour—could it move, be moving, at all?
A. One mile an hour.
Q. Can an engine move along at one mile an hour?
A. Yes, sir; without steam move that much.
Q. Do you consider that slow or fast, two miles an hour?
A. Slow.
Q. Very slow?
A. Yes, sir.
Q. Hardly perceptible?
A. Yes, sir.
Q. Less than a man can walk?
A. Yes, sir; very slow walk.
Q. How much faster was engine 166 moving than yours at the time of the collision?
A. Going considerably faster.

Q. Was there anything else could have been done by you and the engineer there to prevent that collision than what you did do?

Objected to by plaintiff as incompetent, irrelevant. and immaterial. Objection sustained, defendant duly excepting.

Q. Is the reversal of the engine the usual and ordinary means for checking a train?

A. It checks the train to a certain extent, yes sir.

Q. What is the effect of it to give it a backward motion?

A. It checks the speed—it won't start back immediately.

Q. It gave it a backward motion back—it had to stand still?

A. Yes, sir.

Q. When that engine reverses, that gave it a backward motion?

A. Yes, sir.

Q. Then the train, I understand you, was going slowly down grade towards this other engine?

A. Yes, sir.

Q. Moving about two miles an hour?

A. Two or three.

Q. Moving very slowly?

A. Yes, sir.

Q. Is it usual for all of the crew, brakemen and switchmen, to be on top of the train while moving in the yards in that way?

A. Yes, sir; not when we went up there; just starting they would be on the train; we had not got to our destination then.

Q. What was your destination?

47 A. We had only to go a short distance further when we got on the switch.

Q. Who was to turn the switch?

A. I don't know.

Q. Expected one of your crew to turn the switch?

A. Yes, sir.

Q. They generally got off to go ahead?

A. Yes, sir.

Q. What is the usual speed of a train running up there from the lower yard to the upper yard?

A. About six miles an hour.

Q. You testified in your examination-in-chief this engine 154 belonged to the lower yard; you mean by that it had no business in the upper yard?

A. No, sir.

Q. That is, it is ordinarily at work in the lower yard; whenever business required it, it takes cars from the lower to the upper yard?

A. Yes, sir.

Q. That is the purpose for which these engines were kept in these yards?

A. Yes, sir.

Redirect examination:

Q. Was this bell rung at all from the time you left the lower yard or until you reached the upper yard?
A. Yes, sir.
Q. Where?
A. At the crossings of the streets.
Q. There was no whistle blown?
A. Not until this—but one prior to the collision.
Q. That was a danger signal?
A. Yes, sir.
Q. How long before the accident before the last bell was rung?
A. At Union street?
Q. How far is that from where the injury occurred?
A. About 900 or 1,000 feet.
Q. That was rung because of the crossing there?
A. Yes, sir.
Q. Who has charge of the switch engine?
A. The engineer.
Q. Solely?
A. Yes, sir; supposed to be.
Q. You answered a question of Mr. Waggener's, saying you had only a short distance to go until you got on the switch?
A. Yes, sir.
Q. You were making haste to get in on the switch.

Objected to by defendant as leading. Question withdrawn.

Q. Was there any haste on the part of 154 to make time before 166 got down—before you got in on that switch?
A. I don't know; I did not have any conversation with the engineer in respect to that.
Q. How far before you could make that switch?
A. About two car lengths; that would be about 60 or 70 feet.
Q. How long would it have taken you to stop running at the rate you were going?

Objected to by defendant as calling for the opinion of the witness. Question withdrawn.

48 Recross-examination:

Q. I understand you at the time the whistle was blown, the engines were two or three car lengths apart?
A. Yes, sir.
Q. Going towards each other?
A. Yes, sir; about 60 or 80 feet.
Q. How far can one of these locomotive whistles be heard, or could that have been heard?
A. About a mile or so, I should judge.

Redirect examination:

Q. You say it was two or three seconds between the whistle and the time of the collision?
A. Yes, sir.

MIKE LAVELLE, sworn, testified on behalf of plaintiff as follows:

Direct examination:

Q. Where do you reside?
A. Atchison, Kansas.
Q. What is your business?
A. I am in the grain business at the present time.
Q. Do you know Mr. Mackey?
A. Yes, sir.
Q. Were you acquainted with him on the 11th of February, 1882?
A. Yes, sir.
Q. Do you remember of Mr. Mackey being injured on that day?
A. Yes, sir; I do.
Q. Where were you at the time of the injury?
A. I was, I think, a little bit west of Kinney's corner.
Q. Did you see the collision?
A. Yes, sir.
Q. Did you see train 154 going west before the time of the collision?
A. Yes, sir; I saw it just as it was coming up.
Q. Where did you see it first?
A. Well, when it got around the stock yards it was coming up.
Q. After it crossed Union street?
A. Yes, sir.
Q. How fast was it running then?
A. I should judge about six miles an hour.
Q. About six miles an hour?
A. Yes, sir.
Q. You have been around trains a good deal?
A. Yes, sir; I have been looking on them a good deal there; it was blowing hard.
Q. How long was that before the time of the collision, at the time you saw it around near the scale there?
A. At the stock yards there?
Q. How long after that before the time of the collision?
A. A little while.
Q. How many seconds or minutes was it?
A. I think it was about a couple of minutes.
Q. You say you saw them when they came together?
A. Yes, sir.
Q. How fast was 166, — on which Mackey was riding?
A. I thought they were running about the same speed—the two trains—so far as I could judge; I could see them very plain. I thought it was very strange one or the other did not stop or whistle. I heard the whistle from one—I think the train going west—and the collision came right away; just about as soon as I heard the
49 whistle the collision came.
Q. The collision and whistle all about the same time?
A. I heard the whistle first; then the collision came right away; I immediately made a big racket there; I ran over; then the engineer was on the north side; it may be his foot was hurt—bleeding.

Q. How did the engineer get there?

A. I could not tell; I think he rolled down the bank; he was lying there; he was not able to get up when I saw him; I went up on the track then, and I noticed Mr. Mackey; I noticed him sitting on the end of a tie, his leg ripped up; I think the old overall was ripped up his leg; he showed considerable grit, I think, for the fix he was in.

Q. Was his leg bleeding?

A. Yes, sir.

Q. You did not hear any whistle before this you speak of?

A. No, sir.

Cross-examination:

Q. You say you were at Federal street, by Kinney's corner?

A. A little west of there.

Q. Up by Patterson's boarding house?

A. Yes, sir; just east of there.

Q. You saw this engine cross Union street?

A. I saw it coming around there at the stock yards.

Q. Now, ain't you mistaken about this; you say you were west of Kinney's?

A. Yes, sir; you can see it plain—just as far as you can see them now; you could see two engines.

Q. You were on what street?

A. I think it was Federal street; that street there.

Q. Were you on Main street?

A. A little south of Main street.

Q. How far south?

A. Couple of perch-, I think.

Q. On Federal street?

A. I was west of Federal street a little.

Q. You could see [the] engine cross Union street?

A. I saw it when it was coming around the corner at the stock yards where that corner is.

Q. Now, you say you felt satisfied that engine 166, coming from the west towards the east, was coming about six miles an hour?

A. I thought it was; I know it had [a] strong head of steam on, pulling hard.

Q. That was the engine from the west coming back?

A. No, sir; it did not seem to have much power to — it; it did not seem to have much of a pull behind it.

Q. It was running about 6 miles an hour?

A. I think it was.

Q. Did you see any person on the train?

A. I noticed nobody; I thought it strange they did not stop before they struck.

Q. How far did the other engine, coming from the east going towards the west, run after you saw it before the collision—how many feet?

A. It must have been a couple of hundred yards.

Q. After it got around that point?

A. Yes, sir; I think it was.

Q. Have you looked at it since the thing happened to see whether you are right?

A. Yes, sir; I have studied it over.

Q. Been up there and looked at it?

50 A. Yes, sir.

Q. Is it not a matter of impossibility to see that engine for a distance of 200 yards west of that rock quarry and east of that bridge before you get up to that dump to the bridge? The collision occurred which side of the bridge?

A. I think it was east, where there is a big dump or fall there.

Q. Now, I will ask you how many feet the point of that rock quarry is east of that bridge?

A. You can see 200 feet west of the quarry, I think, where the collision took place.

Q. You said it was two hundred yards?

A. Yes, sir; 200 yards.

Q. That is 600 feet?

A. Yes, sir; I saw the engine that long.

Q. Now, is not the rock quarry immediately directly north of that bridge?

A. I ain't sure of it — I stepped the ground; that is what I think about it.

Q. 200 yards?

A. Yes, sir.

Q. You say they ran how far after you first saw it before the collision—200 yards?

A. Yes, sir.

Q. You stood there and saw them; saw each engine run 100 yards, or both of them 200 yards each?

A. I saw them run about 200 yards—each of them.

Q. That would be 400 *hundred* yards each of these engines ran coming up?

A. I noticed them coming together.

Q. The engine from the east you said ran two hundred yards after you saw it, you said, up on Federal street, up by Kinney's?

A. Yes, sir; you have a very plain view of it.

Q. The engine coming from the east toward the other you thought ran about the same speed as the other?

A. Yes, sir; that is what I think.

Q. Can you tell the speed of an object of that kind coming towards you as well as an object going sideways?

A. They were both going sideways to me—like one going east and the other west.

Q. You were standing almost north of the shops—north of the Central Branch shops?

A. I was not as far west as the shops.

Q. You were on Federal street?

A. That street at Kinney's. If I miscalled the street I don't know.

Q. What time in the day was it at the time the occurrence took place? I ask you what time it was.

A. A little before noon. I did not see or notice the time. I know it was before dinner.

Q. You went down there after the collision?

A. After the collision I went over there to see what the racket was down there.

Q. How far is Federal street from Union street?

A. If I am right about it, I think it was about two blocks.

Q. That is right—two blocks?

A. Yes, sir.

Q. Then you stood two blocks west of Union street and one block north of Utah avenue?

51 A. Two blocks west of Union street, yes, sir, I stood.

Q. About how far south of Main street—how many feet south of Main?

A. A couple of perch-.

Q. Were you on any building there?

A. No, sir.

Q. On the ground?

A. Yes, sir.

JOE ELSWORTH, sworn, testified on behalf of plaintiff as follows:

Q. What is your business now?

A. Working in the Pacific yards.

Q. For the Missouri Pacific Railway Company?

A. Yes, sir.

Q. How long have you been in that business?

A. About two years.

Q. What were you doing on the 11th of February, 1882?

A. Switching in the Pacific yards.

Q. At Atchison, Kansas?

A. Yes, sir.

Q. What train were you connected with?

A. Working *at* engine 166 in the upper yard.

Q. In what capacity were you working?

A. Switchman.

Q. Are you acquainted with Mr. Mackey?

A. Yes, sir.

Q. That is the same train upon which he was fireman?

A. Yes, sir.

Q. How long had you been working there before that time?

A. I don't just recollect how long it was; some few months.

Q. How long had you been working with 166?

A. I could not just say. I worked with different engines; worked with 206; sent her away. Then I worked with 166.

Q. Where did 166 belong when she worked; which one worked in the upper yards; how many yards belong to the Pacific Railroad Company at Atchison, Kansas?

A. There is what is called two yards—the upper and lower yards.

Q. 166 belonged in the upper yards?

A. Yes, sir.

Q. What engine worked in the lower yards?

A. 154.
Q. Do you remember of Mackey being injured?
A. Yes, sir.
Q. At the time of his injury how many men connected with 166?
A. Three yard-men, engineer, and fireman.
Q. Three yard-men, engineer, and fireman?
A. Yes, sir.
Q. Who were the three men?
A. Tom Cusack, John Nolan, and myself?
Q. Do you know how Mackey was injured?
A. Yes, sir.
Q. In what way?
A. Two engines running together.
Q. How did it injure him?
A. Mashing his foot.
Q. What engines was it ran together?
A. Engine 166 and 154.
52 Q. Where did the injury occur?
A. This side of the Central Branch shops.
Q. This side of the Central Branch shops?
A. Yes, sir; east a block, about a block.
Q. Is there a bridge between the point where the injury occurred and the shops?
A. Yes, sir.
Q. How far from the bridge was it?
A. About 60 feet east of it, to the best of my recollection.
Q. About 60 feet east of it?
A. Yes, sir.
Q. Which direction was 166, engine 166, moving at that time?
A. East.
Q. Which direction was 154 moving at that time?
A. Going west.
Q. Where had the engine 166—the one you were with and the one Mackey was on—where had she been just prior to the injury?
A. Been working on the shop tracks, the repairs; tracks up to the shops were getting in bad order.
Q. What track was she on at the time of the injury?
A. Main line.
Q. Then the injury occurred on the main line?
A. Yes, sir.
Q. Where were they coming from at the time of the injury?
A. 166 was coming from—she was backing out of the track south of the main line.
Q. How far were they out on the main line?
A. At the time of the injury the whole train was on the main line, at the time.
Q. How many cars were there?
A. Nine or ten cars, I think, at the time of the injury.
Q. Was there not six or seven?
A. I don't recollect now, it has been so long ago; we had to haul about 12 or 15 cars.

Q. You had just come out of the side track?

A. No, sir; came out of the side track and made one switch and was backing down to get back in.

Q. Came out of the side track, went up the main track, and was backing down again?

A. Yes, sir; at the time of the collision.

Q. How long had you been out on the main track?

A. Not long; about 10 minutes, I suppose, if it was that; long enough to go out and make one switch.

Q. You suppose you had been out about ten minutes on the main track?

A. Yes, sir.

Q. Where were you at the time of the injury?

A. I was standing west of [the] bridge, on the north side of the track.

Q. What were you doing there?

A. Standing at the switch—close by the switch.

Q. Were you fixing to throw the switch; what were you doing?

A. Just waiting for them to come down there; I should throw the switch, or Cusack; we were both standing close together; either one of us could throw the switch.

Q. How fast was 166 moving at the time of the injury?

A. She was going about four miles an hour, maybe a little more; four or six miles an hour.

Q. You think about four miles an hour or six—between four and six?

53 A. Yes, sir.

Q. They had collected some cars up the track before they started down?

A. Yes, sir.

Q. Did you see 154 coming before the collision?

A. I saw them down on the main line; I never paid any attention to them.

Q. When was the last you saw of them before the collision?

A. I could not say; I happened to see them on the main line and paid no more attention to them. I don't believe I looked that way until they hit.

Q. Were you on the south side of the train before the injury?

A. When we pulled out of the side tracks I rode down on the south side of the cars; pulled out of the side tracks.

Q. How long, how many minutes or seconds, before?

A. It was maybe two or three minutes before—something like that.

Q. Did you give any signals from the south side?

A. I suppose pretty apt to give signals when we first pulled out of there.

Q. Who was on the south side of the engine?

A. The fireman.

Q. That was Mackey?

A. Yes, sir; on the south side.

Q. He received the signal from the south side?

A. I suppose he received that one at that time.

Q. What is the condition of the track east of the place where the injury occurred—is it level or is it up grade?

A. It is a little sag right where it happened; runs a little bit east; the water runs pretty well down that way, then comes another little bridge, then there is a little sag up about 100 feet or two, and then it is down grade again.

Q. How is the track east of the place where the injury occurred? Is it straight or crooked?

A. It is straight.

Q. For what distance?

A. For maybe four or five blocks.

Q. Four or five blocks; is it not straight for a quarter or half a mile?

A. About a quarter of a mile.

Q. Was there any engine or any obstruction between a half or quarter of a mile east of the point where the accident occurred other than engine 166?

A. Not as I know of.

Q. Did you hear any whistle blown or bell rung except just at the time of the collision?

A. I don't think there was any bell rung; I did not hear any; there was a whistle blown just before the engine struck.

Q. How long before?

A. I could not say.

Q. Did half a second intervene?

A. I just heard the alarm and turned around to see what it was, and it struck then.

Q. Do you know where 154 was going then?

A. Fetching some coal to the upper yard.

Q. What was she loaded with?

A. Coal.

Q. Loaded with coal?

A. Yes, sir.

54 Q. Box cars?

A. Coal cars.

Q. What was the result or condition of the engine after the collision, after they came together?

A. 166's tank was bursted up a little—that is, the hind end; the front of the tank of the tender part was bursted and let the water out; the cab of the engine was bursted, the stack was knocked off the engine, and the bell, about all the injury was done to it.

Q. Well, how was Mr. Mackey injured—in what way; was he caught in the machinery in any way?

A. The best I could tell by looking at it after it happened, the tank caught his foot in the cab on the brass round, run from the back to the boiler-head.

Q. Did you see Craft?

A. I saw him after it happened.

Q. Did you see him before the injury?

A. Yes, sir; just as he passed me at the switch—passed me—I saw him in the engine.

Q. Did you see Mr. Mackey?

A. I could not say; I may have seen him; at the same time I did not pay attention to it.

Q. You don't remember?

A. No, sir.

Q. When you first saw 154 where was it?

A. She was coming up the main line.

Q. Standing still or moving?

A. I think she was moving; I did not look to see whether she was running or not; I just saw the engine down there; I suppose they had been moving; they were quite a distance off then.

Q. You never heard any other whistle, or any signal of any kind there, ringing of the bell or blowing of the whistle, except the one you refer to from 154?

A. No, sir.

Q. You say the usual place for 166, the one Mackey was on, was to work up there in that yard?

A. That is where they mostly done their work.

Q. What was their business?

A. Making up trains; switching trains and making transfers.

Q. That was the same business on 154?

A. Yes, sir.

Q. In the lower yard?

A. Yes, sir.

Q. What was the condition of Mackey's leg as to the injury; see any blood, bones, or anything?

A. Yes, sir.

Q. What condition was it in?

A. His foot was mashed; blood came out through the boot.

Q. How long had you known Mackey?

A. For about five years; I guess may have been longer.

Q. How was his health?

A. I have always known him to be a stout, hearty man.

Q. Where was Cusack at the time of this injury?

A. At the time, standing north of the track, west of the bridge.

Q. Where was the other party, Nolan?

A. He was cutting cars up the main line, I think.

Q. That was west on the main line, 166, upon whick Mackey was on?

A. Yes, sir.

Q. Was he up there at the time of the injury?

55 A. Nolan, yes, sir; he was.

Q. I will ask you did you give Mr. Mackey any signal on the south side when you cut these cars off?

A. When we came down on the south side, when we split, I gave him a signal.

Q. From the south side?

A. Yes, sir; I don't recollect whether the cars were cut off from the south side or north side.

Q. You gave him a signal from the south side?
A. Yes, sir; I gave him a signal from the south side.
Q. Did you ever have any experience as a fireman?
A. A little; yes, sir.
Q. Had you any experience before the time this injury occurred?
A. Yes, sir; I had a little.
Q. How long?
A. Been about a year before that.
Q. At what place?
A. In the Santa Fé yard, firing a switch engine awhile.

Cross-examination:

Q. After this train drawn by 166 came out of the repair track, did you then back west?
A. After we came out of the repair track?
Q. Yes, sir; backed west on the main track?
A. No, sir; backed east.
Q. About how far after you came out of the repair track?
A. After we came out then we headed west.
Q. Did not you back west to cut off these cars?
A. Not then; rode back; backed out, then hit the main line.
Q. Then you went west?
A. Yes, sir.
Q. How far west on the repair track?
A. Kicked them up, I suppose, just about enough for what we had—12 or 14 cars.
Q. How far was the engine from the repair track when you stopped there, west of it?
A. She was right opposite it—the repair track—up by the switch.
Q. How far was that engine then from the bridge?
A. It would be about two car lengths, I think.
Q. About two car lengths?
A. Yes, sir.
Q. Then, when they cut these cars off you stepped over to the north side?
A. Yes, sir.
Q. Remained on the north side?
A. Yes, sir.
Q. There were no member of the crew on the south side to give signals?
A. Not at that time that I know of.
Q. Was there any signals to be given on the south side after that for any purpose?
A. General rule to give them either side whatever way you are working; after we made the switch we were both on the north side except Nolan.
Q. You were working, then, from the north side after that?
A. Yes, sir.
Q. You say this train 166 went down the track from 4 to 6 miles an hour?
A. Yes, sir.

56 Q. The speed continued to increase until the collision?
A. After it started the speed continued to increase until the collision.
Q. Was there any bell rung on that engine after it left there until the collision?
A. I could not say.
Q. You did not notice the speed of train 154?
A. No, sir.

Redirect examination:

Q. You mean that it was stationary, then started and attained a velocity of from four to six miles an hour before the collision?
A. After they got started they were running about that.
Q. Up to the time of the collision?
A. I don't know; he may have checked a little by the time he hit. It was——
Q. Not any more than the two figures you have named?
A. No, sir; I don't suppose it was. To the best of my recollection that is about what I think it was running.
Q. Who had charge of the movement of the engine?
A. Jesse Craft was the engineer.
Q. Did he have charge of the movement?
A. Yes, sir; I suppose he handled the engine.

JOE MAGEE, sworn, testified on behalf of plaintiff as follows:

Q. What is your business?
A. Railroading.
Q. What railroad are you working for?
A. For the bridge company now.
Q. What are you doing there?
A. Switching.
Q. Are you acquainted with Mackey?
A. Yes, sir.
Q. Were you acquainted with him on the 11th of February, 1882?
A. Yes, sir.
Q. What was he doing then?
A. Firing engine.
Q. What were you doing then?
A. Had charge of the engine—foreman.
Q. Foreman of what engine?
A. 154.
Q. What do you mean by foreman of the engine?
A. I had charge of the crew working with the engine.
Q. You had nothing to do with the working of the engine?
A. No, sir; nothing more than telling them where to go and what I wanted them to do. Outside of that I had nothing to do with it.
Q. Were you with 154 at the time of the injury?
A. Yes, sir.
Q. Where did you come from that morning?
A. Lower yard.

Q. There are two yards, then, are there—the upper and lower yard?

A. Yes, sir.

Q. [To] which yard does 154, which you were working with, belong?

A. Belonged in the lower yard; that is where we done the principal part of the work.

Q. Where did 166 belong?

A. Upper yard.

Q. How many cars were attached to 154, if any, at the time of the injury?

A. About twelve or 14 cars; I don't know which.

57 Q. 12 or 14?

A. Yes, sir.

Q. Were they loaded?

A. Yes, sir; loaded with coal.

Q. Where were they being taken from?

A. Lower yard.

Q. How far is the lower yard from the upper yard?

A. About three-quarters of a mile.

Q. Where were you taking them to?

A. To the upper yard.

Q. Where were you going to put them?

A. Wherever I could find room for them.

Q. What was their destination at the time you started; any particular track?

A. No, sir.

Q. Did you start for the scale track?

A. No, sir.

Q. Where did you tell them to go to at the time they went up the track?

Objected to by defendant. Question withdrawn.

Q. Where were they going to at the time of the collision; where was 154 taking these cars?

A. Going to the west end of the yard.

Q. That is clear away past the point?

A. That is the west end of the scales.

Q. West end of the scales?

A. Yes, sir.

Q. That was west of the point where the injury occurred?

A. No, sir; east of the point.

Q. East of the point?

A. Yes, sir.

Q. Why did 154 stop before it got to that point?

Objected to. Question withdrawn.

Q. What was the cause of the train passing the point where the injury occurred if they were going to stop at a point east of it?

A. The injury occurred west of the scale track switch.

Q. Now, you had 13 cars of coal attached to the engine?

A. Yes, sir.
Q. What was the object of passing west of the point where you intended to stop?
A. Had to get the cars over the switch before you could throw it.
Q. Then back in?
A. Yes, sir.
Q. Did you see 166 before the time of the collision?
A. Yes, sir.
Q. Where was she then?
A. Backing out of the repair track.
Q. On the main track?
A. Yes, sir.
Q. How long did you see it before the time of the injury?
A. She was five or six car lengths apart, I guess.
Q. Had you seen it before that?
A. I saw them before that; they were standing still.
Q. How far down the track were you when you saw them?
A. West of the scale-house when I first saw them.
Q. That is about a quarter of a mile?
A. West; about scale-house when I first saw them.
Q. That is, when you first saw them?
58 A. Yes, sir.
Q. Where were you at the time the injury occurred?
A. Standing at the main-line switch, leading from the main line to the scale track.
Q. Where were the other men connected with your train?
A. Spaulding was back throwing the scale-track switch, four or five car lengths; I don't know which.
Q. Anybody on the train at the time of the injury?
A. No, sir.
Q. Nobody but the fireman and the engineer?
A. That is all.
Q. How fast was 154 moving at the time you first seen 166?
A. Just barely moving, that was about all; two or three miles an hour.
Q. Just half a second before the collision?
A. Yes, sir.
Q. Did you see Bergen, to see where he was?
A. No, sir; I did not notice Bergen.
Q. Did you see Riley, to see where he was?
A. No, sir.
Q. The point was to get to your destination—to get in on the side track with these coal cars?
A. Yes, sir.
Q. Did 154 whistle before the time of the injury; if so, how long before?
A. I just had time to turn around; that is all; I was facing east; when I turned around west they struck.
Q. How far east of the point where the injury occurred was the track straight?
A. To 10th street.

Q. How far is that?
A. I do not know; about three blocks, I guess.
Q. Is it not further than that?
A. Might be.
Q. Was there anything between 10th street and the place where the injury occurred to obstruct the view of the engineer and fireman of 154?

Objected to by the defendant as calling for the opinion of the witness. Question withdrawn.

Q. Was there any obstruction on the track?

Objected to by the defendant [as] incompetent, irrelevant, and immaterial. Overruled, defendant excepting.

A. I did not see any.
Q. You did not see any?
A. No, sir.
Q. What was the condition of the track at the place where the injury occurred; up or down grade, or level?
A. Where the injury occurred I don't know; it is about on a level, I guess; I don't know exactly; I could not tell.
Q. How many car lengths west of the switch which leads into the scale track where you propose to put the coal cars was it; about where the injury occurred—that is, between the place where the injury occurred and the switch which led into the scale track?
A. I ain't sure; I think we had thirteen cars of coal, and just lacked one car of getting into the switch; I recollect distinctly, because we had to back the cars down and put them into the bluff track.
Q. If you had got one car length further with your train you could have backed down and got in on the scale track?

Objected to by defendant. Question withdrawn.

Q. How long have you known Mr. Mackey?
59 A. I don't remember exactly now.
Q. Before the time the injury occurred?
A. I don't know; a couple of years, more or less.
Q. What was the condition of his health before that time?
A. So far as I know he was strong and healthy.
Q. Did you see Mackey after the accident?
A. Yes, sir; I did.
Q. What condition was he in?
A. Sitting on the south end of the tank on the foot-board, with his foot mashed; south side of the tank.

Cross-examination:

Q. You were assistant yard-master at that time, were you?
A. No, sir.
Q. Who was assistant yard-master?
A. There was no assistant.

Q. Well, you were performing the duties of yard-master, were you not, at that time?

A. I was foreman.

Q. Foreman of the crew?

A. Yes, sir.

Q. You had charge of that train?

A. I had charge of 154.

Q. Your duties as foreman there gave you authority to direct the movement of the train?

A. Yes, sir.

Q. What rate of speed was your train moving at the time you crossed Union street?

A. About three or four miles an hour I guess.

Q. Did the speed of that train decrease from that point up to the point of collision?

A. Yes, sir; a little bit.

Q. So that at the time of the collision you say it was moving about two miles an hour?

A. Yes, sir; barely moving.

Q. How far apart were the cars at the time you first noticed engine 166 backing down?

A. About three car lengths; I ain't sure now.

Q. About how fast was that train moving then?

A. I don't know.

Q. You could not tell?

A. No, sir.

Q. Was it moving faster than 154?

A. Yes, sir; I should judge so.

Q. Very much faster?

A. Considerably; yes, sir.

Q. At that time you say there was a whistle danger signal given?

A. Yes, sir.

Q. How is that given?

A. One blast of the whistle.

Q. A few seconds after that 166 went right into 154?

A. Yes, sir; I just had time to turn around.

Q. At the time they struck you say 154 was barely moving?

A. Yes, sir.

Redirect examination:

Q. You say at a certain period 166 went into 154; you mean they came together, or one ran into the other? Counsel just asked you to state if 166 ran into 154. Do you know whether it was a mutual collision?

A. They ran into one another, I should judge.

60 Q. Have you ever had any experience as a fireman?

A. No, sir; nothing more than firing for fun in somebody's place on the road.

[By Mr.] WAGGENER:

Q. Had experience in firing men out of their places or positions? I believe that is what they call it.

A. I don't believe so; I have been fired myself.

F. M. BUTLER, sworn, testified on behalf of plaintiff as follows:

Direct examination:

Q. What is your business?

A. Railroad man.

Q. Are you railroading now?

A. No, sir.

Q. When did you quit?

A. Day before yesterday.

Q. What railroad company have you been working for?

A. Missouri Pacific.

Q. What were you doing on the 11th of February, 1882?

A. I had charge of an engine up in the yard.

Q. Are you acquainted with Mr. Mackey?

A. Yes, sir.

Q. Do you remember of Mackey being injured?

A. Yes, sir.

Q. Did you see the two engines when they came together?

A. No, sir; I did not see them strike.

Q. You did not see them strike?

A. No, sir.

Q. How far were you from the place where the injury occurred?

A. About a block and a half—I guess two blocks. I was right at Union street.

Q. West were you?

A. East of where the collision occurred.

Q. East of the place of the collision?

A. Yes, sir.

Q. Were you on the car?

A. No, sir; on the ground.

Q. Do remember 154—how fast she was running when she passed Union street?

A. About four to six miles an hour, I believe.

Q. How far is Union street from the place where the injury occurred?

A. About two blocks or a block.

Q. How fast was 154 running at the time of the collision?

A. I don't know how fast she was running at the time she struck. I did not see them strike.

Q. Was there any obstruction on the track between the point where the collision occurred?

A. No, sir.

Q. And Union street or 10th street?

Objected to by defendant as calling for an opinion of the witness. Overruled, defendant duly excepting.

Q. There was not, you say?
A. No, sir.
Q. For what distance east of where the injury occurred? What condition was the track at the place where the injury occurred; was it level or up and down grade?
A. Up grade.
Q. Was the track straight or crooked east of the point
61 where the injury occurred?
A. Straight.
Q. For what distance?
A. A quarter of a mile or half a mile.
Q. Did you hear any whistle sounded by 154 before the collision?
A. I heard a whistle.
Q. How long before the collision?
A. About two seconds, I should judge.
Q. About two seconds before the collision?
A. Time enough for a man to look around.
Q. Was there a whistle blown before that?
A. No, sir.
Q. By 154?
A. I don't know which engine whistled.
Q. Did you hear 154 whistle?
A. I heard a whistle.
Q. Before that on that day did you hear a whistle before that as you were coming up the track?
A. No, sir.
Q. Did you see 166 before the collision, the engine upon which Mackey was?
A. I saw her; I don't know how long it was before the collision. I saw her up there switching at the shop.
Q. Switching back and forward.
A. Yes, sir.

By COUNSEL:

Q. It is well understood Mackey was on 166.

Cross-examination:

Q. You were in charge of an engine there at that time?
A. Yes, sir.
Q. Which engine?
A. 175.
Q. Standing still?
A. At the shop getting water.
Q. Were you down near Union street at the time?
A. Yes, sir.
Q. Going which direction?
A. Standing still, talking to Charley Wickham?
Q. He is yard-master?
A. Yes, sir.
Q. He was standing there by Union street with you?
A. Yes, sir.

Q. At that time you say 154, the train going west, crossed Union street four or five miles an hour?
A. Yes, sir.
Q. It commenced to reduce speed after that?
A. I did not notice it. I did not notice it any more until after the collision.
Q. What is the usual speed of cars going up and down there?
A. Generally about five or six miles an hour.
Q. You did not see them at the time of the collision?
A. No, sir.
Q. You could not see how fast either one was running at the time?
A. No, sir.

JOE HOLDER, sworn, testified on behalf of plaintiff as follows:

Direct examination:

62 Q. Where do you live?
A. In Atchison.
Q. Where were you on the 11th day of February, 1882?
A. I was down in the rock quarry this side of the Central Branch shop.
Q. Are you acquainted with Mackey?
A. I am not acquainted with him. I have seen him all along since I have been here.
Q. Do you remember of two engines meeting each other there that day on the track?
A. Yes, sir.
Q. How far were you from them?
A. About fifty feet.
Q. What were you doing there?
A. I was working for the company in the quarry there.
Q. For what company?
A. For the Missouri Pacific Company.
Q. Did you see a train coming from the east that day?
A. Yes, sir; saw them both.
Q. Do you know what number that was?
A. I did not pay any attention to the number.
Q. How long before they met did you first see it?
A. I guess it must have been running three or four minutes.
Q. How fast was it running?
A. Making about five or six miles an hour.
Q. Which train was that?
A. The one coming from the east.
Q. The one coming from the west? Then they were both running?
A. I mean the train coming from down town going west.
Q. How fast was it running at the time of the collision? You say that was two or three minutes before the collision?
A. Yes, sir; they had not made any check at all.
Q. You say you were right alongside, within fifty feet?

A. Yes, sir; I was right opposite it when they struck.

Q. Did you see the engineer at the time of the collision on the engine coming from the west?

A. I say I was on the north side. I saw both engineers.

Q. What became of the engineer on the train coming from the west?

A. It made a great deal of smoke and one thing and another, and I don't know whether he jumped out of the window; he came out down the hill.

Q. Down towards where you were?

A. Yes, sir; rolled right down the hill.

Q. Rolled down the hill?

A. Yes, sir; when he rolled down me and another fellow went there. I saw that he had his foot bleeding.

Q. Did you hear any whistle before the collision of the engine which was coming from the east?

A. Whistled about the time she struck.

Q. Was there any whistle before that?

A. No, sir.

Q. Hear any bell rung before that?

A. Yes, sir.

Q. I mean on the engine—any bell rung on that at all—the engine coming from down town going west?

A. No, sir.

Q. Did you notice which train Mackey was on?

A. Yes, sir.

Q. Which one was it?

A. On the one next to the round-house.

63 Q. Coming down this way—east?

A. Yes, sir.

Q. Did you hear any bell being rung on that train just as they were on the bridge?

A. Just as they were on the bridge a little tap along four or five times—along on the bridge. He was down throwing in some coal, I stated.

Q. You say you saw him throwing in some coal?

A. Yes, sir.

Q. When he crossed the bridge?

A. Yes, sir; just as he crossed the bridge [he] quit ringing the bell.

Q. You were about 50 feet away?

A. Yes, sir; I was the first man got to him.

Q. In what position in relation to the track were you—where were you standing—that is, in the stone quarry?

A. This side; right precisely on the side.

Q. On the north side?

A. Yes, sir; on the north side.

Cross-examination:

Q. What business are you engaged in now?

A. I have been railroading pretty much all along since that; I am working for Mr. Early now.

Q. Who did you first tell about this what you saw?
A. Never first told anybody much about it; the only man I was talking with was the man who was with me.
Q. You never testified before?
A. No, sir.
Q. Talked with nobody about this case?
A. No, sir; only after working on the road.
Q. How fast was the engine Mackey was on going at the time of the collision?
A. Not much difference.
Q. Going about six miles an hour?
A. Not much difference.
Q. You say about the time they crossed below you heard the bell tap?
A. Yes, sir.
Q. That was about how far from the place of collision?
A. I don't think it was over sixty feet from the bridge where they struck.
Q. Who rang the bell?
A. Mr. Mackey, I guess, was ringing the bell. I was looking at the engineer; he was looking out—down.
Q. You say Mackey was ringing the bell?
A. Yes, sir.
Q. Mr. Mackey was in a better position to know than you were?
A. I don't know whether he was or not; he ought to know, of course—I saw him.
Q. Was he looking forward any time?
A. Why, when they were running up and down by me all the time I was right on the side of the road. The work was done in the repair yards.
Q. As he came down the track would you notice him looking east?
A. No, sir.
Q. Never saw him looking east at all?
A. No, sir.
Q. Did you see him all that morning?
A. I saw him all the time.
Q. He was always looking west?
A. No, sir; I did not say he was always looking west; he was that morning.
Q. Always that morning he was looking west?
A. Yes, sir; when he was backing anything down that way, any engine headed that way; of course when backing this way he
64 was looking that way.
Q. He was looking west all the time that morning?
A. No, sir.
Q. Did you ever see him looking east that morning?
A. Yes, sir.
Q. What time did you see him looking east that morning?
A. I could not tell.
Q. You remember seeing him look east?

A. I remember seeing him looking east when they had crossed ahead of me, backing in.

Q. You remember seeing him look east?

A. I noticed him.

Q. You could see his eyes?

A. I did not say I could see his eyes.

Q. Anything to prevent him seeing down the track?

A. No, sir.

Q. All he had to do was to glance around and he could see clear down to 10th street?

A. Yes, sir.

Q. You saw him looking east occasionally before that; at the time of the injury he was looking west?

A. Yes, sir.

Q. Which side of the cab was he looking out of?

A. I could not say how he was looking then.

Q. I mean about sixty feet before that he was looking west?

A. Yes, sir; he was on the south side.

Q. Sitting on his seat?

A. Yes, sir.

Q. About how long had you seen him sitting on that seat before the injury?

Q. Where I was standing at the engine passed up and down all the time. While I was doing this work sometimes he was on the seat, sometimes putting in coal.

Q. Now, at the time of this injury you saw them up the track west of the bridge—noticed them up there?

A. No, sir.

Q. You noticed them up there; did you notice them when they got off this cross-street down?

A. Yes, sir.

Q. How far were they from the place of the injury at the time they got off the cross-street and kept down until they came in collision?

A. I don't know the distance; very short distance.

Q. About how many feet?

A. Must have been close on to a couple hundred feet.

Q. At the time you noticed him sitting on his seat near that street, or was he putting in coal?

A. He was sitting on his seat just before he got to the bridge. Before he got to the bridge he commenced ringing the bell, and as he got on the bridge he commenced throwing in coal. When he got across the bridge he got on the seat again.

Q. How far had he run across the bridge before that collision?

A. About sixty feet.

Q. When he was on his seat he was looking west all the time?

A. Yes, sir; his face was that way.

Q. You noticed him particularly, so you can swear to that positively?

A. His face was west when I saw him.

Q. There was nothing there, you say, to prevent him looking east?

65 A. No, sir.

Q. You noticed the engineer?

A. Was watching *br*other engineers.

Q. Kept your eye on both of them?

A. Yes, sir.

Q. Facing them?

A. Right side of the road; could see either one.

Q. Kept your eye on both of them?

A. Yes, sir; I wondered they did not stop.

Q. Now, at the time they crossed Union street; did you hear the bell rung on 154 at the time they crossed Union street?

A. I heard the bell rung; I don't know whereabouts.

Q. I mean on the engine going up the track at the time they crossed Union street—along Union street.

A. Yes, sir.

Q. At that time they crossed up there, I mean.

A. No, sir; they did not ring at all.

Q. You noticed that particularly?

A. Yes, sir; I wondered why they did not do something.

Q. You watched the other particularly—the engineer looking west receiving signals?

A. That is what I did; I don't know what he was receiving.

Q. Did you see any man on the north side west of him?

A. No, sir; they had some cars—I could not see.

Q. You think it was about two hundred feet from the bridge west to where they stopped the engine coming down there?

A. It was somewhere in the neighborhood of that.

Q. Do you know where the repair track is?

A, Yes, sir.

Q. How far is that from the bridge?

A. I reckon a hundred feet of the bridge.

Q. How far west of that was the engine when they stopped and cut off the car?

A. They just kicked up the cars past.

Q. Kicked the cars up to near that track?

A. Yes, sir.

Q. Back down with the cars in front?

A. Yes, sir.

Q. The cars west ahead of the engine, and the same time the engine backing down?

A. Yes, sir.

Q. Did you notice the tender there, whether there was any coal in it?

A. Yes, sir; a good deal of coal.

Q. Piled up above the rim?

A. Yes, sir.

Q. Did you see Mackey look out down?

A. I don't know whether he could back about his seat or not; all

before that, when he was shoveling coal—just before he crossed the bridge he was down shoveling coal.

Q. Just before that he was down in the cab?

A. He had his face down the other way; he ought to have seen.

Redirect examination:

Q. He ought to have seen?

A. Anything down below him—west of him.

Q. Ought he not to have seen anything east of him?

A. He could not see out of the back of his head.

Q. You stated what he ought to have seen looking east; what ought this man to have seen going east?

66 Objected to. Sustained.

JOHN STEELE, sworn, testified on behalf of plaintiff as follows:

Q. What business are you now engaged in?

A. Working in a clothing store.

Q. What business were you engaged on the 11th of February, 1882?

A. Running an engine on the Central Branch.

Q. How long have you been running an engine there?

A. About two years.

Q. About two years?

A. Yes, sir.

Q. Had you had any experience as a fireman before that time?

A. Between three and four years.

Q. Had any experience as a fireman on a switch engine at Atchison, Kansas, before that time?

A. Yes, sir; fired a switch engine here in the yard six months.

Q. What was the general duty of a fireman on a switch engine while the engine is being moved from one point to another in the yard at that time?

Objected to by the defendant as calling for the opinion of the witness, and no proper foundation laid to ask the question, and not a proper subject of expert testimony, incompetent, irrelevant, and immaterial. Objection overruled, defendant duly excepting.

Q. You may state.

A. The duty of a fireman on an engine is to keep the engine hot, to keep steam on, and assist the engineer in watching for signals.

Q. Under whose control and direction is the fireman?

A. Under the engineer.

Q. Solely?

A. Yes, sir; while he is on duty, and they are both under the control of the master mechanic.

Q. You have answered, I believe, to keep fuel in the engine and keep it hot?

A. Yes, sir.

Cross-examination:

Q. Is it also a part of his duty to look out for obstructions on the track and prevent accidents?

A. Yes, sir; he don't have as much time to do it as the engineer.

Q. When the engineer is receiving a signal from one direction—the opposite direction the train is running—it is the duty of the fireman to look out for obstructions?

A. No, sir.

Q. You say it is not his duty?

A. It is not his duty, necessarily so.

Q. I don't mean solely his duty. Is it his duty as assistant to the engineer to look out for obstructions and receive signals?

A. They both ought to. It is the duty of one as much as the other.

Redirect examination:

Q. One ought to as much as the other?

A. Yes, sir.

Q. Suppose at a given time the fireman is feeding his engine, is it his duty then to look out?

Objected to by the defendant as calling for opinion evidence and no proper foundation laid, incompetent, irrelevant, and immaterial and not re-examination. Objection overruled, defendant duly excepting.

67 A. It is impossible for him to do so at that time.

Recross-examination.

Q. Suppose at a given time one engine is backing in one direction and the fireman knows that the engineer is receiving signals from the opposite direction, is it not his duty to keep a look out to prevent accidents when the train is moving? Is it not his duty to keep a lookout?

A. No, sir; I can't say it is.

Q. I ask you if it is not his duty to be on the alert all the time?

A. Yes, sir.

Q. And the greater the danger the greater the caution he must use?

A. Yes, sir.

Q. So in running and operation of trains in the yards where he may expect to meet other trains or persons on the track, it is *his* duty of the fireman to be cautious under all circumstances?

A. Yes, sir.

JNO. CAVANAUGH, sworn, testified on behalf of plaintiff as follows:

Q. Where do you reside?

A. Atchison, Kansas.

Q. What is your business?

A. Engineer.

Q. How long have you been an engineer?

A. About three and a half or four years.

Q. What business were you engaged in on the 11th of February, 1882?

A. Running switch engine 154. I ran at night. He relieved me the next morning.

Q. How long had you been running a switch engine at Atchison, Kansas?

A. About a year.

Q. Had you any experience as a fireman on a switch engine before that time?

A. I had a little experience in firing on a switch engine—more on the road. I ran one about a year.

Q. You ran a switch engine prior to the 11th of February, 1882, in the yard?

A. Yes, sir.

Q. How long prior to that?

A. About a year and a half.

Q. Have you operated an engine?

A. Yes, sir; about a year and a half.

Q. As fireman?

A. No, sir; as engineer.

Q. How long as fireman?

A. I fired for about three years and a half on the road and switch engine.

Q. I will get you to state if you know the duties, *of* the general duties, of a fireman on a switch engine, and did you know on the 11th of February, 1882—do you know now?

A. Yes, sir; I ought to. I had one firing for a year.

Mr. WAGGENER: Are not the duties of a fireman prescribed by printed rules of the company—have they had orders up to that effect at that time?

A. No, sir; not at that time. They had before. They were out of date after that time.

Q. Before that time had not they prescribed printed rules, had them in force?

A. Yes, sir.

68 Mr. TOMLINSON: You say they were out of date at that time?

A. They were not living up to the rules.

[Mr.] WAGGENER: They had regular rules governing the conduct of firemen?

A. Yes, sir.

Mr. TOMLINSON: State now from your knowledge of such matters what were the duties, the general duties, of a fireman of a switch engine at Atchison, Kansas, being moved from one point to another in the yard.

Objected to by defendant as calling for the opinion of the witness, and no foundation laid to ask the question, and not a proper subject of expert testimony, and not the best evidence of the facts sought

to be proven; incompetent, irrelevant and immaterial. Overruled, defendant duly excepting.

A. A fireman's duty is to obey the orders of the engineer, to do as he wants him to do, to fire his engine, keep her clean and hot, and watch for signals; if he don't do that all he has to do is to report him to the master mechanic.

Q. Have you stated his duties in the order named of a fireman?

A. Yes, sir; there — some other about smoke and one thing or another which don't concern this matter.

Cross-examination:

Q. Is it also his duty to look out for obstructions, to prevent accidents and collisions?

A. Yes, sir; when he is at leisure.

Q. What do you mean by that?

A. When he ain't firing the engine or breaking coal.

Q. Then it is his duty to look out for signals and obstructions?

A. Yes, sir.

Q. That is as much his duty as breaking coal?

A. Yes, sir.

Q. Signals from whom do you mean?

A. Signals from the crew.

[Mr.] TOMLINSON: Has he any control over the movements of the engine?

A. No, sir.

TOM CORRIGAN, sworn, testified on behalf of plaintiff as follows:

Direct examination:

Q. Where do you live?

A. In Atchison.

Q. How long have you lived there?

A. About 25 or 28 years.

Q. What business are you engaged in now?

A. Railroading.

Q. For what road?

A. Missouri Pacific.

Q. What business were you engaged in on the 11th of February, 1882?

A. Running a train.

Q. In what capacity?

A. Conductor.

Q. Freight or passenger?

A. Construction.

Q. Had you any experience as a fireman in the yards at Atchison, Kans., on a switch engine prior to the 11th of February, 1882? If so, state how long.

A. No, sir.

Q. Had no experience on the switch engine as fireman?

A. No, sir.

69 GEO. C. ALLEN, sworn, testified on behalf of plaintiff as follows:

Direct examination.

Q. Where do you live?
A. Atchison, Kansas.
Q. What is your business?
A. Yard-master of the Chicago & Atchison Bridge Company.
Q. Is the yard part of it on this side of the river?
A. I guess as much one side of the river as the other; cars crossed both ways.
Q. Have you ever had any experience as a fireman on a switch engine?
A. Yes, sir.
Q. At Atchison, Kansas?
A. No, sir.
Q. Did you, on the 11th day of February, know the duties of a fireman on a switch engine in the yards at Atchison, Kansas?
A. I know what the duties are; they are the same; they are calculated to be the same all over.
Q. Do you know what they were in Atchison, Kansas, in the yard there?
A. I presume I do.
Q. Did you?
A. As far as the fireman's duties are concerned.
Q. Did you or not?
A. I did.
Q. State in the order in which they come what the general duties of a fireman on a switch engine at Atchison, Kansas, was on the 11th day of February, 1882, when moving from one point to another in the yard.

Objected to by defendant as calling for the opinion of the witness, and no foundation laid to ask the question, and not a proper subject of expert testimony, and not the best evidence of the facts sought to be proven; incompetent, irrelevant and immaterial. Overruled, defendant duly excepting.

A. To keep his engine clean; when his engine is out in the yard he is under the orders of the engineer; when she is running to fire the engine; to keep plenty of steam, and obey the orders of the engineer, whatever it was, as long as it don't conflict.
Q. Did the fireman at that time, the 11th of February, 1882, have any control over the movements of the switch engine?

Objected to by the defendant as calling for the opinion, and no proper foundation laid to ask the question, and not proper subject of expert testimony, and not the best evidence of the facts sought to be proven. Objected, defendant duly excepting.

A. No, sir.

Cross-examination:

Q. Was it any part of the duty of the fireman to look out for obstructions and prevent collision?

A. It is when he can do so without interfering with other business.

Q. Is not that one of his duties?

A. All employees' duties are to that effect—engineer, fireman, and all; it is the duty of all of them to prevent accidents and collisions if they can.

Q. To prevent accidents and collision when they are running?

A. Yes, sir.

[Mr.] TOMLINSON: And to look out for signals from men connected with their own train?

A. Yes, sir.

70 And the above and foregoing was all the evidence introduced by plaintiff up to the resting of the said case.

And thereupon said defendant duly filed its demurrer to plaintiff's evidence for reasons in said demurrer contained, which demurrer is in words and figures as follows, to wit:

Demurrer to Evidence.

District Court, Atchison County, Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the said defendant and demurs to the evidence of the plaintiff for the following reasons, to wit:

First that such evidence does not prove facts sufficient to constitute any cause of action against the defendant.

Second. That on the pleadings and evidence the plaintiff is not entitled to recover.

EVEREST & WAGGENER,
Attorneys for Defendant.

Which demurrer, being argued by counsel and considered by the court, was overruled; to which action and ruling of the court said defendant at the time duly excepted.

And thereafter said defendant, in order to maintain the issue on its part, introduced the following evidence in order, to wit:

Depositions of witnesses taken before me, a notary public within and for the county of Atchison and State of Kansas, on the 4th day of September, 1882, between the hours of 8 o'clock a. m. and 6 o'clock p. m., in said county, pursuant to annexed notice, in an action pending in the district court within and for the county of Atchison and State of Kansas, wherein Patrick Mackey is plaintiff and the Missouri Pacific railway is defendant.

The said plaintiff appeared in person and by his attorneys, Tomlinson and Griffin, and the said defendant appeared by its attorneys,

Everest and Waggener, and thereupon the said defendant produced the following witnesses in the following order:

71 PATRICK MACKEY, of lawful age, being first duly sworn, deposes and says:

1. State your name, age, and residence.

A. My name is Patrick Mackey; age, 39 years; Atchison, Kansas.

2. How long had you been engaged in the railroad business prior to this accident?

Objected to, that witness is a resident of Atchison county, and will be when this case is tried.

A. About four years.

3. In what capacities had you worked during those four years thus engaged?

A. Worked on section part of the time; part of the time in roundhouse; firing at the time I got hurt.

4. How long had you been engaged as fireman prior to the accident?

A. Three or four months.

5. With what person or persons as engineer?

A. Chas. Tunicliff first and Jesse Craft.

6. How long had you worked with Craft prior to the accident?

A. Two to three months.

7. During the time you worked with him did he appear to be competent to discharge his duties as engineer?

A. He did not.

8. How soon after you commenced work with him on an engine did you ascertain that he did not appear to be competent to discharge his duties as engineer?

A. I did not learn that until after the injury.

9. Then, during all the time that you worked with him before the injury, so far as you know, he appeared to be careful and competent to discharge his duties as such engineer?

(Objected to as leading and incompetent.)

A. That was the best of my estimation.

10. At the time of the collision between engines 166 and 154, on Feb. 11th, about how fast was 166 moving?

(Objected to for the reason that it is not shown that 166 was moving at all.)

A. Four to six miles an hour.

11. About how fast was engine 154 moving?

A. That I could not tell.

12. Why could you not tell?

A. I did not see it until it struck.

13. How long had you been looking west just prior to the collision between the two engines?

A. I just looked west at the time they struck.

14. In which direction had you been looking during the time that the engine you were on had traveled 30 or 40 yards before the collision?

A. I had been looking at the door of the fire-box.

15. In which direction had Craft been looking just prior and at the time of the accident?

A. West, I expect.

16. Why do you think or expect that he was looking west?

Objected to as incompetent.

A. That was the way he was looking when I last saw him.

17. How long before the collision did you last see him?

A. A few seconds, while I was turning around.

18. At the time of the collision, what were you doing?

A. I was aiming to sit down on the seat-box after putting in the fire.

19. At that time did you see Craft?

A. Yes, sir.

72 20. Which way was he looking then?

A. I could not tell?

21. Did you see him there?

Objected to as repetition.

A. I saw him.

22. Just before the collision did you hear any whistle blown?

A. Not until they struck?

23. Then what did you hear?

A. A whistle and a collision at the same time.

24. At the time of the collision, or just prior thereto, had you been ringing the bell on your engine?

A. Not at the time.

25. For what distance had your engine moved east on that track just prior to the collision?

A. About three hundred feet.

26. What had you been doing during the time your engine traveled that three hundred feet?

A. Putting in fire.

27. Was you engaged in putting in coal during all this time?

A. A part of the time.

28. What portion of the time?

A. It might have been half of the time.

29. What were you doing the rest of the time?

A. Watching for signals ahead of me.

30. Was that a part of your duty as fireman?

A. Yes, sir.

31. As you moved east on this track did you notice engine 154 moving west with train on same track at any time?

A. Not until she struck.

32. While you were watching for signals ahead of you was there anything between engines 166 and 154 that would prevent you from seeing 154?

(Objected to because witness has already stated that he did not see 154 until it struck his engine.)

A. Not looking that way, I could not tell.

33. In what direction were you looking, east or west?

A. West.

34. While so looking west, as your train was moving east, was your bell rung; if so, by whom?

A. It was not.

35. Whose duty is it to ring the bell as the train is being moved?

A. Fireman generally does it, if he ain't doing anything else.

36. As engine 166 moved east that day just prior to the accident, on which side of the train, north or south, was the crew attending that train?

A. They were divided up; some of them were on the south side, some were on the north side, and some were on the cars.

37. Give the name or names of the persons on the south side of that train at that time.

A. Joe Ellsworth was the last one I saw on the south side.

38. How far was engine 166 from the place of collision at the time you last saw Joe Ellsworth on the south side of that train?

A. Three or four hundred feet.

39. Did your train continue to move east from the time that you last saw Joe Ellsworth till the engine struck?

A. I could not say.

40. What was Joe Ellsworth doing on the south side when you saw him there?

A. Setting off cars, I suppose, or running in to cut off cars.

73 41. Did your train move west after you saw Ellsworth before the collision?

A. Not that I know of.

42. Did you continue to look west from the time you saw Ellsworth till the collision?

A. I did not.

43. Did you at any time look east after you saw Ellsworth until the collision?

A. I did not.

44. Did the speed of the engine continue to increase from the time you saw Ellsworth until the collision?

A. Yes sir.

45. How many cars were being drawn by 166 at the time of the collision?

A. I don't exactly know; about 6 or 8.

46. Were the cars empty or loaded?

A. I could not tell; some of them were loaded.

47. After you last saw Ellsworth before the collision was Craft looking out of the window until the collision occurred?

Objected to as repetition.

A. Looking out at the window a part of the time; I could not say that he was all of the time.

48. Was it any part of your duty as fireman to look out for obstructions upon the track before the engine as it moved east?

A. If I wasn't doing anything else it was.

49. What was you doing after you last saw Ellsworth, and before the collision, that prevented you from looking ahead?

A. Putting in coal.

50. What was there to prevent you from looking ahead when you were not putting in coal, if anything?

A. If there was nothing else to do I could have looked ahead.

51. Besides putting in coal, what was there to do to prevent you from looking ahead?

Objected to, as the same has been answered before by saying that he was looking ahead for signals.

A. There was a good deal of work breaking coal; I don't know that there was anything at that time.

52. After you saw Ellsworth on the south side of the track before the collision, what portion of your time was taken up in breaking coal?

A. I don't know—while I was putting in the fire—a short time.

53. In what distance could that engine have been stopped moving at a speed, say, of five miles per hour?

A. I don't know.

54. Did Craft reverse his engine before the collision?

A. He did not.

55. Had you seen engine 154 at any time that day prior to this accident; if so, when?

A. I could not say that I did.

56. For what purpose was you moving 166 east at the time of the collision?

A. I could not say.

59. Did you at any time previous to the collision object to Craft running the engine so fast?

A. Not that I know of.

60. Did you not know that it was dangerous and unsafe to run an engine five or six miles per hour in the yards?

A. I did not.

61. Is it not as much the duty of a fireman, when he is not
74 putting in fire, to be on the lookout for signals as it is that of the engineer in charge of the engine?

A. I don't know as it is.

62. Will you say that it is not?

Objected to as leading and incompetent.

A. It is not.

63. Did you not know on February 11th, 1882, that it was the duty of a fireman to be on the lookout for signals and obstructions on the track when not engaged in putting in fire?

Objected to as leading and a repetition.

A. I did not, providing there was anything else to do.

64. When on the lookout for signals or obstructions on the track is there any rule or custom that you know of that requires a fireman to look in any particular direction?

A. Not that I know of.

65. Then, as I understand you, *that* after you saw Ellsworth on the south side of the track and until the collision *that* one half of your time was employed in putting in fire and the other half in looking out for signals or obstructions on the track. Will you please explain why you did not or could not see engine 154 on the same track within three or four feet of you?

A. Because I was putting in the fire and watching signals ahead of me.

66. What do you mean by watching signals ahead of you—east or west of you?

A. West of me at that time.

67. How many feet did the engine move east after you saw Ellsworth while you were looking ahead for signals until the collision?

A. Something less than three hundred feet.

68. And you state that during that time you did not ring the bell nor look east of you in the direction your engine was moving?

Objected to as leading and incompetent.

A. I don't know that I did.

69. Do you now know of anything that would have prevented you from seeing engine 154 in time to have avoided a collision if you had looked east of you after you saw Ellsworth on the track?

A. If I hadn't been putting in coal and looking out I might have seen it.

70. Was there anything else to prevent you from seeing it beside the fact that you were putting in coal?

Objected to as leading, answer already been given to previous question, and by saying that he was putting in coal and watching for signals ahead of him.

A. Watching signals west of me at the time.

71. What signals were you watching after you saw Ellsworth on the south side of the track?

A. Watching Ellsworth—signals from him.

72. Were you watching signals from Ellsworth after he left the south side of the track?

A. I expected him back on the south side of the track to give signals.

73. At this time were you sitting on your seat or standing up?

A. I was standing part of the time.

74. Did you not know at that time that Ellsworth had to throw a switch?

A. I did not.

75. How many feet was Ellsworth from you at the time that you last saw him?

A. It might have been one hundred and twenty-five feet west of me.

76. At any time after you saw Ellsworth on the south side of the track, and while your train was moving east, did you ring the bell or know of its being rung?

A. I did not ring it or know of its being rung.

77. When a train is moving in the yards five or six miles per hour is it usual and customary to have the bell rung?

A. Usually ring at all crossings and where there is anybody on the track or near it.

78. By whom is it usually rung?

A. The fireman.

79. Is it not usually rung as a signal that the train is being moved?

A. It is sometimes.

80. Is not that usually the signal to yard-men that the train is being moved?

Objected to as leading and incompetent.

A. It is.

81. Is it not also known as a danger signal?

A. Yes.

82. When two engines are moving towards each other on the same track in the same yard what are the usual signals to apprise each other of their movements?

A. Whistle usually when they are approaching and see each other.

83. What position was you in at the time of the collision?

A. I was about in the act of sitting on the seat.

84. In which direction were you looking?

A. West.

85. Just when the collision occurred at what rate of speed was your engine moving?

A. It might have been from four to six miles per hour.

Cross-examination by Mr. TOMLINSON:

86. Where do you reside?

A. Atchison, Kansas.

87. Do you expect to be here at the next term of this court—the district court of this county?

A. I do.

88. Do you expect to be here when this case is tried and have you any intention of leaving this county?

A. I expect to be here and have no intention of leaving this county.

(Signed) his PATRICK x MACKEY. mark.

Defendant also read deposition of Thomas Cusack in evidence, which is as follows, to wit:

THOMAS CUSACK, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes and says:

Q. What is your name, age, business, and place of residence?

A. My name is Thomas Cusack; my age, 24 years; my business, a railroad man; my place of residence, Missouri Valley, Iowa.

Q. Do you expect to be here during the months of November and December?

A. I could not say whether I shall be here or not; I expect to be here at that time if I have work here.

Q. Are you acquainted with Patrick Mackey?

A. Yes, sir.

Q. How long have you known him?

A. About seven or eight months. I first saw him when he began firing on the switch engine.

Q. What were you doing on the 11th day of February, 1882?

76 A. I was switching with engine 166.

Q. In whose employ?

A. In that of the Missouri Pacific Railway Company.

Q. In what capacity?

A. I was foreman of switch engine No. 166.

Q. What was Mr. Mackey doing at that time?

A. He was fireman on engine 166.

Q. Who had control of and who was in charge of the crew of engine 166 on that day?

A. I had charge of the crew.

Q. Who was under you and who composed the crew?

A. Joe Ellsworth and John Nolan.

Q. Do you remember of any accident occurring on that day?

A. Yes, sir; I could not say as to the date exactly.

Q. Do you remember of Mr. Mackey being injured?

A. Yes, sir.

Q. Was Mr. Mackey fireman on engine 166 on that day?

A. Yes, sir.

Q. You state that you remember of Mr. Mackey being hurt on that day; please state all the facts that you know in regard to such injury.

A. I saw the engines when they ran together, and saw them afterwards; he got out of the engine; that is about all I know.

Q. Has the Missouri Pacific Railway Company more than one yard?

A. They have what are called the upper and lower yards.

Q. Which yard was engine 166 working in that day?

A. In the upper yard.

Q. Did it belong to that yard?

A. Yes, sir.

Q. Do you know Mr. William Bergen?

A. Yes, sir.

Q. In what business and in what position was Mr. Bergen at that time?

A. He was engineer of engine 154.

Q. What was his duty at that time and what yard did he work in?

A. In the lower yard; he worked all over, for that matter, but his work was mainly in the lower yard.

Q. Was there a collision in the yard on that day?

A. Yes, sir; there was.

Q. State how it happened.

A. We were switching at the shops and engine 154 was coming up the main line with coal; we had been switching there, and backing down the engines ran together.

Q. Who was entitled to the rights and privileges of that yard first?

A. I suppose that engine 166 would have the right, but we generally gave way to each other whenever it came handy.

Q. Did you see engine 154 before it struck 166 on that day?

A. Yes, sir.

Q. How long before?

A. I should judge they were about four or five car lengths apart when I saw them.

Q. Did you hear any whistles?

A. Yes, sir; I heard one whistle.

Q. From what engine?

A. From engine 154.

Q. How long before it struck engine 166?

A. The whistle that I heard was just after I first saw them?

Q. Did you hear any whistle from engine 154 before that time?

A. No, sir.

Q. At what rate of speed was engine 154 running at the
77 time of the collision?

A. I think that engine 154 was very near stopped at the time of the collision.

Q. At what rate of speed was it running when you first saw it?

A. I could not say. It did not move far when it struck.

Q. At what rate of speed was engine 166 moving?

A. I could not say as to that.

Q. Was the bell of 166 ringing at or before the collision?

A. I could not say.

Q. Would you say it was not ringing?

A. I would not.

Q. Which side of the train were you at that time?

A. I was on the north side of the train.

Q. What were you doing with your crew and with engine 166 at that time?

A. We were switching out some cars from the south side of the track.

Q. Where was engine 166 at the time of the collision with 154?

A. We were just on this side of the bridge, on this side of the branch shops on the main track.

Q. How many cars were there in the train that you had charge of?

A. I think about ten or twelve; I could not say exactly.

Q. How many cars, if you know, was engine 154 pulling?

A. I could not say; I think about the same number of cars of coal.

Q. Were you in plain view of engine 166 at the time of the collision, and could you see engine 166 at that time?

A. I certainly could.

Q. Did you see the engineer or fireman at the time or just before the collision?

A. I saw the engineer.

Q. What was he doing?

A. When I turned around he was looking towards me.

Q. Were you giving any signals at that time?

A. I had given signals to back up after leaving cars on main line.

Q. Who was on the south side of the train?

A. I could not say whether Ellsworth was there or not; the other men were with the cars that were left on the main track.

Q. Mr. Mackey was on the south side of the engine, was he not?

A. I suppose so. I did not see him. That is the place he ought to be.

Q. Was it not a part of his duties to observe and look out for signals from you and others under you?

A. Yes, sir; they are all supposed to watch for signals on their side.

Q. Did you see the engineer or fireman, or either of them, of engine 154 at or just before the collision?

A. Yes, sir; I could see the engineer of 154.

Q. In what direction was he looking?

A. I could not say, but suppose he was looking ahead. I did not pay particular attention to 154. When I first saw it I did not look directly at the engineer.

Q. Do you know what the feeling was, whether kindly or otherwise, between Mr. Craft and Mr. Bergen, who were engineers of their respective trains?

A. I do not know anything about it.

Q, Was there any rivalry about the occupancy of one yard by the engines of another? If so, state what it was.

A. There was no rivalry between them that I saw.

Q. Was there any feeling about the engines of one yard occupying the place of another?

A. No, sir; they all had a right wherever they were.

Q. Did not the engineer and crew of one yard complain against the engineer and crew of another yard for occupying their grounds?

78 A. Of course, sometimes, but they all had a right to our yard and they had to work more or less from the lower yard up.

Q. State if it was not objectionable to your crew to have engineers

and crews of other yards come into your yards and occupy your grounds as against your rights.

A. It all depends whether we were in the right humor to receive them or not. If we were working we did not like it, but had to let them come just the same.

Q. Your crew, with its cars, was in their way that day, was it not?

A. I suppose so, and they were in our way; we were both to some extent in each other's way.

Q. What was the cause of the haste of the crew of 154 in getting into your yards that day?

A. I could not say.

Q. Was it because they desired to get in there and leave their cars and get back?

A. I suppose that was it. They brought their cars up there and wanted to leave some of them on the side track.

Q. How long had you been on the main track before the collision?

A. I expect it could not have been more than five minutes. We pulled out of the side track and shoved up the main track again.

Q. Was the track upon which the collision occurred straight at that point?

A. Yes, sir.

Q. For what distance east of the place of the collision was the track straight and how far could a moving train be seen?

A. I suppose about a quarter of a mile.

Q. Where was Mr. Ellsworth at the time of the collision?

A. I could not say what part of the train he was.

Q. Do you know whether he was on the south side or not?

A. I do not.

Q. Do you Jesse Craft; and, if so, how long have you known him?

A. I have known him from the time he commenced to run the switch engine.

Q. Do you know how long he had run an engine before that time?

A. I could not say.

Q. Was he a competent engineer?

A. I could not say that either.

Q. Was he a careful man?

A. He had always been very careful before that.

Q. Did either he or Mr. Bergen ever make any statement to you in regard to that accident?

A. No, sir; I know he did not and don't think Mr. Bergen ever did. I did not see Mr. Craft from that time until a short time ago.

Q. Have you ever made any written statement in regard to this accident?

A. No, sir.

Q. How long before this accident had you looked down the track east?

A. I do not know how long before.

Q. Was it a part of Mr. Mackey's duties to observe and look for signals?

A. Yes, sir; supposed to be; that is the way I always took it when there was not other work.

Q. Where were you at the time of this collision?

A. I was standing on the north side of the train; I could not say whether right on the switch or close by it. I was throwing the switch myself and was at least close by it, if not on it.

Q. How far was that from engine No. 166?

A. I should judge it was only about ten feet, as it passed by.

Q. How far was that from the place where the collision occurred?

79 A. I think about four or five car-lengths.

THOMAS CUSACK.

WILLIAM BERGEN, sworn, testified on behalf of defendant as follows:

Direct examination:

Q. Where do you reside?

A. Atchison, Kansas.

Q. What business are you engaged in?

A. Engineer.

Q. How long have you been an engineer?

A. Four or five years.

Q. What business were you engaged in on the 11th of February, 1882?

A. Running a switch engine in the Missouri Pacific yards.

Q. What engine?

A. 154.

Q. How long had you been running engine 154 at that time?

A. I guess about a year.

Q. Do you remember the circumstance of Mr. Mackey being injured by a collision there?

A. Yes, sir.

Q. About what time in the day was it?

A. Between 11 and 12 o'clock.

Q. What kind of a day was it—bright or cloudy?

A. Bright.

Q. Between what two engines was the collision?

A. 154 and 166.

Q. Who was your fireman at that time?

A. James Reiley.

Q. How many cars was your engine drawing at that time?

A. 13.

Q. What were they loaded with?

A. Coal.

Q. From what place had you drawn those cars?

A. From the lower yard.

Q. In the city of Atchison?

A. Yes, sir.

Q. On what track were you moving as you went west—side track or main track?

A. Main track.

Q. For what distance west of Tenth street is that a straight track?

A. I guess a quarter of a mile.

Q. Can a person stand at the shops and see down the track—that is, if it is clear, down to Tenth street?

A. Stand on the main line and see down?

Q. That is what I mean—stand on the main line?

A. Yes, sir.

Q. About how fast was your train moving, from 10th street to Union street, on that day just before the collision?

A. I don't think she was going over four or five miles an hour.

Q. What is the usual speed of a train in the yards?

A. Four to six miles an hour.

Q. Was your train headed west?

A. Yes, sir.

Q. Where were you on that track when you first discovered engine 166—how near to Union street?

A. Between the scale-house and Union street.

Q. Which side of Union street is the scale-house?

80 A. East side.

Q. How far from Union street?

A. I think about 500 feet.

Q. Where was engine 166 at the time you first saw it?

A. Up towards the shops.

Q. What were they doing at that time?

A. Switching.

Q. At what rate of speed was your engine moving at the time you crossed Union street?

A. I don't think she was going over four miles an hour.

Q. How far apart were the engines at the time the danger became apparent to you?

A. About 100 feet.

Q. Who called your attention to it, if any one particularly?

A. No one that I know of.

Q. What did you do as soon as you discovered that that engine 166 was backing down the track towards you?

A. Gave a signal of one sharp blast of the whistle to stop.

Q. Is that a danger signal?

A. Yes, sir.

Q. What else did you do at that time?

A. Reversed the engine to stop.

Q. What do you do when you reverse the engine?

A. Throw her backward and immediately give her steam.

Q. What is the effect of reversing the engine and giving the engine steam after it is reversed?

A. It is to stop the train if it is going forward; reverse the lever to stop from going ahead.

Q. Was there anything else there you could have done at that time yourself to stop that engine?

Objected to.

Q. I ask you, as an engineer, to state what, if anything, else you could have done to stop that engine at that time than you did do?

A. I could not do any more than to reverse the engine.

Q. At the time you reversed that engine and gave her a backward motion what was the effect on the train?

A. To stop it.

Q. At what rate of speed was your train moving at the moment of the collision?

A. She was barely moving.

Q. Could you tell from the position you occupied how fast engine 166 was moving towards you?

A. No, sir; she was coming towards me; I could not tell.

Q. You could not tell, coming towards you?

A. No, sir.

Q. What was the speed of engine 166 at that time in comparison with the speed of your train at the time of the collision?

A. I could not say.

Q. Was it slower or faster?

A. It seemed to be pretty fast, the way it struck.

Q. Do you know how many cars were attached to engine 166?

A. No, sir; I do not.

Q. Do you know what the general duties of a fireman are?

A. Yes, sir; I ought to know.

Q. State what those duties are with reference to looking for obstruction on the track and signals. Did you have at that time a knowledge of the general duties of a fireman?

81 A. I guess I ought to. I have been on an engine 3 or 4 years.

Q. State what thsoe duties were with reference to looking out for obstruction and signals.

A. To keep the engine hot, breaking coal, and firing her, and keep his engine clean.

Q. What, if anything, in regard to signals and obstructions?

A. He has to look out for signals and obstructions when the engineer can't see them.

Q. Under whose control and direction is the fireman?

A. Under the engineer's as long as he is working there.

Q. He then has certain specified duties to attend to?

A. Yes, sir.

Q. In firing the engine how many shovels of coal is usually put in at one time when the engine has already been heated up and in operation?

A. It is according to how you work her. Sometimes they take it as fast as you can give it to her, and sometimes no more than three or four shovels.

Q. What is the usual custom in regard to a switch engine in the yard?

A. From 2 to three shovels; sometimes four; owing to how they work.

Cross-examination:

Q. In whose employ are you now?
A. Missouri Pacific Railway Company.
Q. Missouri Pacific Railway Company?
A. Yes, sir.
Q. Where did you start with these cars attached to the engine 154 on the morning of the accident, and just before the injury?
A. Lower yard.
Q. How far east from the point where the injury occurred in the upper yard?
A. I don't know. Some say a mile; some say it is over. I don't know the distance.
Q. These cars were loaded with coal, were they not?
A. Yes, sir.
Q. Who was with the train when you started?
A. Joe Magee, foreman; Al. Spaulding, brakeman.
Q. Al. Spaulding, brakeman?
A. Yes, sir.
Q. Did they stay with the train?
A. Yes, sir.
Q. Were they on the train at the time of the accident?

Objected to by defendant as not proper cross-examination. Overruled, defendant duly excepting.

Q. Who was on the train beside you at the time of the injury?
A. Me and my fireman, Magee, and Spaulding.
Q. Do you know they were on the train?
A. I saw them.
Q. Is it not a fact that they were not on—Magee was not on at the time of the injury?
A. No; he was not on then; he rode up from the lower yard. I don't know whether he got off, staid on, or anything.
Q. Was there anybody on that train except you [and] the fireman at the time of the collision?
A. No; I guess not; I don't know.
Q. In going that mile did you whistle at any time?
A. Yes, sir.
Q. When?
82 A. I blowed two whistles for the switch in the lower yard.
Q. Did you whistle after you entered the upper yard?
A. One whistle.
Q. That was at the time of the collision?
A. Yes, sir.
Q. How long before the collision?
A. A very short time.
Q. How many seconds was it—I mean after the whistle—when the collision occurred?
A. Three or four seconds, maybe.
Q. After you whistled; now, did you whistle at any point within a quarter or half a mile east of that before that whistle?
A. No, sir.

Q. Had you whistled any other time?
A. Only two whistles down in the lower yard.
Q. There was no whistle at any other time except at the time of the collision, except a quarter of a mile east of that?
A. No, sir.
Q. There was no other whistle within half a mile east of that, was there? You did not whistle at any other time?
A. No, sir; not that I know of.
Q. Now, what condition was the track there, straight or crooked, at the place of the collision?
A. Straight.
Q. For what distance east?
A. It is a quarter of a mile, I guess; I should judge it was.
Q. You say, I believe, in answer to a question of Mr. Waggener's, you saw 166 when you were four or five hundred feet east of Union street?
A. Yes, sir; at the scale-house; I guess it was about that.
Q. When you first saw engine 166?
A. Yes, sir.
Q. How far is that from the point where the injury occurred; quarter of a mile, is it not?
A. About 1,000 feet.
Q. About 1,000 feet?
A. Yes, sir; more or less.
Q. Was engine 166 then on the main track?
A. I could not say whether she was on the main track or side track.
Q. You knew engine 166 worked in that yard?
A. Yes, sir.
Q. You knew she was engaged in switching cars that morning?
A. Yes, sir.
Q. You knew she usually belonged there?
A. She belonged wherever they called them.
Q. Where were you starting to with these cars?
A. Started up there to get in some of those side tracks with her; I suppose they were.
Q. How?
A. That is what they started for; side track them in the upper yard.
Q. On the scale-house track switch?
A. I could not tell which switch.
Q. Didn't you testify before you gave a deposition in this case?
A. Yes, sir; I supposed they were going, in some of them.
Q. Did they go in the scale-track?
A. The engineer can't tell where they are going; the yard-men don't tell them all the time.
Q. Wasn't it your instructions to put them on the scale-house track switch?
83 A. To put them up in there somewhere—the scale-track is a side track.
Q. You say that was your intention?

A. To put them in on the side track.
Q. Wasn't your intention to put them off at the scale-tracks?
A. That is a side track.
Q. Was that the side track?
A. I suppose so; I could not tell.
Q. Was there any side track you were intending to put them on of the four or five there?
A. I suppose around there.
Q. Didn't you have instructions from the foreman?
A. I did not. He told me to take them up above.
Q. Wasn't this question asked you when your deposition was taken and this answer given: Was it your intention on that morning to get in on this side track that you have referred to in the above answer before 166 got in the way? And you answered, She was up on the main line; we wanted to get in on the side track; we wanted to get in there; saw she was far enough up to let us in had she not caught us. Didn't you answer that in that way?
A. I answered it right, I guess.
Q. Was it true at the time you answered it?
A. I suppose it was.
Q. Then your intention was to get in on this scale-track switch?
A. Yes, sir.
Q. How far was the place of collision from the scale-house track; can you state; are you familiar with the yard?
A. A person can be familiar and not know distances.
Q. Estimate it by car lengths, if you can do that from the scale-track switch to the collision—to the point where the collision occurred?
A. I think it is about 300 feet, more or less.
Q. Had you passed the scale-house track switch with your engine, with your entire train, at the time of the collision?
A. I could not tell.
Q. Hadn't you passed that scale-house track switch, with the exception of one car?
A. There is two switches there.
Q. The one you were going in on?
A. Just passed the main-line switch.
Q. With the exception of one car?
A. I could not tell.
Q. Was all passed with the exception [of] one or two cars?
A. I could not say now.
Q. Hadn't you got almost past with your train?
A. I got past with the engine; I could not say how many cars — along there.
Q. Can you approximate?
A. No, sir.
Q. You were running up the main track with the intention of getting your train past this switch so you could back down?
A. Yes, sir.
Q. Your intention, as you stated in your answer here — before 166, which Mackey was on, could get down?

A. Yes, sir; we went up there when he was out of the way; then he backed down on us.

Q. It was your intention to move so you could clear the switch and move down your train on there?

A. Yes, sir.

Q. You expected engine 166 would be out of the way, so as to let you in?

84 A. My intention was when we went up there—went up far enough to let us back as soon as we went up—[to] see a straight road back.

Q. I asked you if that wasn't your intention; was it with the intention of getting up there before 166 backed down?

A. Yes, sir; get far enough up to clear the switch and back back before 166 backed on us.

Q. You wanted to get there before 166 reached there; didn't you want to get there before 166 reached it? You can answer yes or no, if you were not trying to do that at that time.

A. My intention was when 166 moved west—I wanted to go far enough to get in—get in on the side track; 166 backed down and caught us.

Q. Was not this question asked you and you gave the following answer then: You wanted to get in on this side track before 166 ran out or could get in. And your answer was, I wanted to get on this side track when 166 was out of the way far enough to let us in. You answered that way?

A. That is about the same.

Q. You say you saw them, 166, up there in the yard working when you were within about a quarter of a mile of them or a 1,000 feet?

A. About 1,000 feet, I should judge.

Q. You were advancing towards them all the time?

A. Yes, sir; advancing slowly.

Q. Was there any obstruction on the track, cars or anything else, to obstruct the view.

A. Nothing.

Q. It was a straight track?

A. Yes, sir.

Q. Why didn't you whistle before you did to warn them of the danger?

A. I thought I whistled time enough for him to stop his engine.

Q. You thought you whistled time enough for him to stop his engine?

A. 1,000 feet ought to be sufficient.

Q. What time elapsed from the time you first saw them until the time of the collision?

A. It was not very long.

Q. Two or three minutes?

A. I don't know; I could not tell; it has been so long ago it has run out of my mind.

Q. At the time you whistled—was the whistle you gave—did that say they were bound to give up the right of way on the track on account of your whistle—bound to stop?

A. They were to look out and not run into us.
Q. You were to look out and not run into them?
A. I don't think we did run into them, the speed we were going.
Q. You don't think you ran into them?
A. No, sir.
Q. You don't think there was any collision?
A. Yes, sir; there was a collision. If he had been running as slow as I was Mackey would not have his leg off.
Q. You stated you don't know how fast they were running?
A. I said by the way he struck he was going pretty fast.
Q. You don't know what speed he was going?
A. No, sir.
Q. Two engines going in an opposite direction would make a pretty loud crash when going two miles an hour or four miles?
A. It did not smash 154 up any.
Q. Smashed 166 up, running into 154?
A. Of course it smashed it up, running into another engine—running into 154 with 13 cars of coal behind her.
85 Q. Did not they run into each other?
A. I suppose they both ran together.
Q. They got into each other?
A. Yes, sir; one a little faster than the other; that is all.
Q. Suppose you had whistled, say, at Union street—gave a loud whistle—could it have been heard where Mackey was?
A. Yes, sir.
Q. How far is Union street from the point where the injury occurred?
A. I don't know.
Q. Estimate it?
A. It may be 800 or 1,000 feet?
Q. Suppose you had whistled at 700 feet; would that be warning to them?
A. I suppose it would.
Q. Suppose you had whistled at 600 feet?
A. Whistled at ten feet, it would be warning to them.
Q. Suppose you had whistled at 500 feet; would there be plenty of time to stop then?
A. Yes, sir.
Q. Without the cars coming together—whistling at 500 feet?
A. Yes, sir.
Q. Supposing you had whistled at 400 feet; would there have been time to prevent the collision?
A. There is time for me to stop my own train.
Q. Answer the question. Would there have been time to stop your engine in 300 feet or 400 feet?
A. Yes, sir; time to stop my own if I gave it at 400 feet.
Q. You say you shut off steam; you shut off at the time you blew the whistle?
A. Yes, sir; shut off steam and reversed the engine.
Q. That is the time you blew the whistle?
A. Yes, sir.

Q. You blew the whistle and shut off steam all about the same time?

A. Yes, sir.

Q. That is about as you stated—you blew the whistle about two or three seconds before the collision?

A. Yes, sir.

Q. Was there any brakes applied by you?

A. I could not tell that.

Q. You don't know.

A. No, sir.

Q. Would you have noticed it had there been; would there have been any indication on the engine; could you have noticed from your position there where you were as engineer if brakes had been applied?

A. Going so slow I suppose I could.

Q. Is it not always the case they can tell when brakes are applied by stoppage of the wheels or check on them?

A. According to what engine you have got.

Q. Could you have on that engine when the brakes were applied, if there had been any?

A. Yes, sir.

Q. You could have told on that engine?

A. Yes, sir; could have told on any engine.

Q. Can you say then whether there was any applied?

A. I could not say.

Q. Mr. Reiley was in the cab with you?

A. Yes, sir.

Q. Did he say anything to you before the collision—speak to you about it?

A. Not that I can recollect of.

86 Q. You say he said nothing to you then?

A. Not that I can remember.

Q. Did he make use of this remark: Better look out and whistle?

A. No, sir.

Q. Anything of that kind?

A. Nothing that I know of.

Q. You never heard any remark about the approach of the engine?

A. The only remark that was made in the cab was just before I reversed. I says: Riley, we are going to get it in good shape this time. That is all I heard.

Q. What did you mean by you were going to get it in good shape this time?

A. 166 was going to give it to her.

Q. You staid in there?

A. Yes, sir; of course.

Q. The engineer on the other train jumped out?

A. Yes, sir; I believe he did.

Q. You were not expecting much danger then by staying in there then. If you had apprehended danger you would have jumped out?

A. A man would be foolish to stay in danger.

Q. A man would be foolish to stay in danger if he expected danger to himself?

A. Yes, sir.

Q. What direction were you looking after you first saw them, when you were coming up the track a quarter of a mile east of there?

A. Keeping a lookout for 166.

Q. Looking west in the direction of 166.

A. Looking that way; I guess so; looking that way most of the time.

Q. Were you looking in their direction?

A. I might have turned around, I suppose; I could not say.

Q. Part of the time, then, you were looking west, towards 166?

A. Yes, sir.

Q. Which way was the fireman looking?

A. I could not tell.

Q. Was 166 in plain view all the time from the time you first saw her in view; never out of sight?

A. Yes, sir.

Q. Was there any of your crew or any person ahead for the purpose of turning the switch or giving a signal?

A. Not that I know of; two men staid behind.

Q. Was there anybody behind you for the purpose of giving a signal?

A. No, sir.

Q. Mr. Waggener asked you about the duties of a fireman; did you state in answer to his question the duties in the order named; that is, the first, second, and so on? You stated that to keep the engine hot—started out by saying to oil and break coal. His duties are in the order named, are they?

A. His duties, when he is not doing them, is watching for signals in switching.

Q. It would not be very easy to run an engine without keeping a fire?

A. No, sir.

Q. You say you usually put in three or four shovels of coal; is it not necessary sometimes to break the lumps with a hammer of some kind?

A. Yes, sir; you have got to break the coal.

Q. When you speak of looking out for signals you mean from men connected with the train?

A. When he is not doing that he is looking out for signals sitting up there.

87 Redirect examination:

Q. Mr. Tomlinson asked you if the whistle was blown at Union street. I will get you to state if 166 was moving towards you until when you crossed Union street—if he left the side track at that time and started down.

A. That I could not say.

Q. Is it or not a frequent occurrence to you—engines on tracks and in the yards to meet—working there?

A. Yes, sir; meet there everywhere.
Q. What do you say?
A. Yes, sir; meet them everywhere in the yard.
Q. Is it your custom to stop your engine and get out and go up and ascertain what the other engine is going to do?

Objected to.

Q. Did you blow the whistle as soon as the danger became apparent to you?
A. Yes, sir.
Q. Did you reverse your engine to give the engine a backward motion as soon as the danger became apparent?
A. Yes, sir.
Q. Previous to that time did you or not see any indication of danger previous to the time you blew the whistle and reversed the engine?
A. Yes, sir.
Q. How long before?
A. Might have been 2 or 3 seconds.
Q. What did you then do as soon as this became apparent to you?
A. Blew the whistle and reversed her is all I could do.
Q. At that time did you see any of the employees—I mean the fireman or engineer on 166?
A. I saw the engineer afterwards.
Q. In which direction was he looking?
A. Jumped down the bank the last time I saw him.
Q. The first time you saw him on the engine?
A. I did not see him.
Q. That is the first or last time you saw him?
A. The first time I saw him after they came together we was standing on the deck of the engine.
Q. Previous to the time that 166 ran into you, you saw him jumping down the bank just before the collision or at the time of the collision?
A. At the time of the collision.

Recross-examination:

Q. You say you acted as soon as the danger became apparent to you?
A. Yes, sir.
Q. You did not already state to this man, Billy, we are in for it now or something to that effect? Had not the danger become apparent to you before you expressed the idea to your companion?
A. No, sir.
Q. You were advancing towards him constantly, were you?
A. Yes, sir.
Q. You could have blown the whistle at 500 or 600 or 200 feet—you did not blow until you got within 200, and two or three seconds after you blew the collision took place?
A. Yes, sir.

Q. You say you did everything that was necessary as soon as the danger became apparent to you—is that your judgment?

A. My engine was going slow.

Q. Is that your judgment about it as soon as the danger became apparent?

A. 100 feet I blew the whistle.

88 Q. Is that your judgment about it?

A. Yes, sir; that is my judgment about it.

Q. Would you have done it, if you had to do it over again, what you did do—delay as long as you did?

A. I don't know. As one engine keeps working up they worked back and forward; as he went up I went up; that is the way we had to work.

Q. Would you repeat that same thing there again with your present experience?

A. I don't know; I could not tell.

Redirect examination:

Q. I will ask you, Mr. Bergen—Mr. Fenlon says you could have blown the whistle at 200 feet—what is the necessity for blowing the whistle and giving that signal except that danger is apparent?

A. There is not any that I know of.

Q. You say that it is a frequent occurrence for engines to work to and fro on the same track?

A. Yes, sir; as one engine gives the track the other takes it.

Q. Fills it up?

A. Yes, sir.

Q. In that way you carry on the business of switching cars back and forth?

A. Yes, sir.

CHAS. WICKHAM, sworn, testified on behalf of defendant as follows:

Direct examination:

Q. Where did you reside on the 11th of February, 1882?

A. Atchison, Kansas.

Q. What business were you then engaged in?

A. General yard-master for the Missouri Pacific.

Q. Do you remember the circumstance of the collision of two engines, 166 and 154?

A. I do; yes, sir.

Q. Where were you at the time of that collision?

A. I was just west of Union street.

Q. West of Union street—how far west?

A. About 50 or 100 feet, I guess.

Q. How far west of Union street did this collision occur?

A. About 800 feet.

Q. At the time engine 154 was moving west what was it drawing?

A. Had some coal—I don't know exactly the number of cars—12 or 14.

Q. It was headed west?

A. Yes, sir.

Q. Did you notice the engine as it crossed Union street going west?

A. I did not notice the engine particularly—I was right at the train.

Q. How far did you stand from the train as it crossed Union street?

A. Ten or 12 feet.

Q. For what purpose did you get off the train?

A. Got off to go and look at the side track to see what room there was.

Q. Did you then walk west?

A. Yes, sir.

Q. Could you tell from comparison between your walking and the speed of the train about how fast the train was moving at the time it crossed Union street?

A. I could tell very near.

Q. How fast was it moving?

A. Three to five miles an hour.

89 Q. What is the usual speed of a train in the yard switching cars to and fro and making up trains?

A. Four to six miles an hour.

Q. At that time, as you crossed Union street going west, did you see engine 166?

A. Yes, sir.

Q. Where was that at the time 154 crossed Union street?

A. Up about the shop.

Q. What were they doing up there?

A. Switching some cars, I think; standing still at the time.

Q. How far were they at the time 154 crossed Union street; what was the distance between the two engines at the time you saw them standing still up there?

A. About 1,000 feet, I guess.

Q. About 1,000 feet at the time 154 crossed Union street?

A. Yes, sir.

Q. I understand you to state the collision took place about 800 feet west of Union street?

A. About 800 feet west of Union street.

Q. How far was engine 166 west of Union street at the time 154 crossed Union street going west; how far west of Union street was engine 166?

A. I could not give an accurate estimate.

Q. Was it east or west of the bridge?

A. West of the bridge.

Q. Standing still?

A. Apparently so, I should judge.

Q. State whether or not the speed of 154 increased or decreased from the time it crossed Union street up to the time of the collision?

A. He had his engine shut off; she was not working steam and naturally decreased.

Q. Could you tell by sign or movement the steam was shut off?
A. I could tell by the movement of the train.
Q. At the time of crossing Union street — engine 154, you say you were 100 feet west of Union street?
A. 50 or 100 feet.
Q. Were you standing still?
A. I was walking west.
Q. At that time did you see any indication of a collision?
A. No, sir; I did not.
Q. How long after that was it before you saw 166 coming down?
A. I did not notice it until the whistle blew.
Q. In which direction were you looking at the time he blew the whistle?
A. Walking up towards the switch to throw the switch to put the cars on the side track?
Q. Were you walking along with the movement of the train as it went west?
A. Yes, sir.
Q. When he blew the whistle was it a danger signal he gave?
A. Yes, sir.
Q. What did you then discover with reference to the position of 166; how far apart were they?
A. I should judge they were about two or three car lengths apart.
Q. What was the speed of 154 at the time the whistle was blown?
A. I did not think she was moving at all; she was barely moving, that is all.
Q. What was the speed of 1866?
A. I could not say.
Q. Why?
A. I was too far away to tell the speed of her.
90 Q. It was coming towards you?
A. Yes, sir.
Q. What was the speed of 166 as compared with 154, without giving an estimate of the speed 166 was moving [at]; was it moving faster or slower?
A. 166 was moving very much faster than 154.
Q. At the time the whistle was blown do you know whether the engine was reversed?
A. 154—I don't know, I am sure.
Q. That engine was then west of you?
A. Yes, sir.
Q. How far west?
A. I could not say exactly.
Q. Some considerable distance?
A. Yes, sir.
Q. Was the rear end of the train near to where you were?
A. Very near; yes, sir.
Q. How far were you from the cars at the time the whistle was blown—the cars being drawn by 154?
A. Not over 10 feet.
Q. The cars were then moving past you?

A. Yes, sir.

Q. At that time, you say, when the collision took place, 154 and that train was barely moving, if they were moving at all?

A. They were barely moving; I don't think they were moving.

Q. What injury, if anything, was done to 154 at that time?

A. No injury to 154.

Q. What was the injury to 166; what condition did you find that in after the collision?

A. I went right up there before they got Mackey out, and she was pretty badly jammed up. The smoke-stack and head-light and bell frame and front end were knocked in.

Q. A flat car up on it?

A. Flat car lay on top of the deck of 166.

Cross-examination:

Q. Are you still in the employ of the Missouri Pacific road?

A. Yes, sir.

Q. What position?

A. I am a conductor on the division of the Atchison section.

Q. At this particular time you were yard-master?

A. Yes, sir.

Q. Did you have any control over this moving train on this side?

A. Yes, sir.

Q. Had you directed 154 to go west?

A. I gave them instructions that morning to go up on the repair track and switch out the cars.

Q. At the time they were moving up there with those cars were they moving under your direction when they were taking up those coal cars with 154?

A. They were moving under direction; I was going——

Q. Were they moving under your instructions and directions?

A. I don't know as they were; the foreman was there.

Q. You did not give them any particular instructions that morning; whatever instructions they had was from their foreman?

A. Yes, sir; I had given the foreman instructions to take the cars up and put them in on the side track—to put them out of the way.

Q. In order to put them on the side track they had to advance up in that neighborhood?

A. Yes, sir.

91 Q. What side track did you instruct them to put them on?

A. Not any particular side track.

Q. That was for the foreman to direct, any specific track?

A. Yes, sir. I don't know as he did.

Q. You stated that you gave them directions to do something up there?

A. Yes, sir; I had that morning.

Q. They were working the yard they were accustomed to work in?

A. Yes, sir.

Q. Generally known by the employees in the neighborhood they were there?

A. Yes, sir.

Q. You say there is a straight track for about the distance of one thousand feet between the two trains when you first saw them?

A. Yes, sir.

Q. 154 could plainly see 166 ahead—any person on the locomotive watching?

A. Yes, sir; 166 could plainly see anybody on 154 if they were looking in that direction.

Q. From your location which you occupied, your first impression is 154 was not moving at all?

A. No, sir; I did not think 154 was moving at all. If she was, she was barely moving. I don't think she was moving at all.

Q. You don't think she was moving at all?

A. No, sir.

Q. You are not satisfied from the testimony of other people. Your testimony would be, according to your sight at the time, it was stationary?

A. I should judge, from the best of my knowledge, they were about at a standstill.

Q. You say it slackened speed from the time you first saw it up to the time of the collision?

A. Yes, sir; about Union street.

Q. Had the steam been shut off?

A. Yes, sir.

Q. Did you hear the engineer's statement—he did not shut off steam until he whistled?

A. I was here. I did not pay much attention to his statement at all.

Q. You saw him shut off steam at Union street?

A. From the movement of the train he had shut off steam.

Q. From the movement you judged he had shut off steam?

A. A person accustomed to that business can tell pretty quick whether an engine is working steam or not.

Q. Had you any experience running an engine?

A. I have had some experience in the locomotive department, yes, sir.

Q. How is the grade at the point where the collision occurred?

A. At that time where the engine was, was about on a level; take it from where engine 166 was down to the collision, is down hill; comes down a little from Union street; for about 700 feet is about on a level, or nearly so.

Q. How far above the switching place on this side track had 154 gone at the time of the collision—had all the cars passed so they could be backed on the siding?

A. No, sir; had not all been over yet.

Q. How much did they lack of putting them all over?

A. Lacked a car length or two.

Q. Do you know whether there was any haste of getting up there before 166 got down in order to get back on the siding?

A. No, sir; they were not making any haste; they were just east far enough at Union street; the way the grade was the train would reach up there.

92 A. L. SPALDING, sworn, testified on behalf of defendant as follows:

Direct examination:

Q. Do you remember the circumstance of these two engines having a collision on February 11th, 1882?

A. Yes, sir.

Q. At the time of the collision or shortly before. State if you were up there in the yard.

A. I was an employee on the train engine 154.

Q. Were you on the ground?

A. Yes, sir.

Q. Which side of Union street?

A. A little west of Union street.

Q. How near Wickham?

A. I think Wickham was about the scale-house when we were going along up, I think, but followed along west. I could not state how close he was at the time.

Q. How far west of Union street were you at the time of the collision?

A. Near the scale-track or side track.

Q. That would be about how many feet?

A. 292 from the center of Union street.

Q. You have measured that?

A. No, sir; I got it from the company; I did not measure it; I got it from the measures in the yard that Mr. Talmage as civil engineer measured.

Q. Now at the time engine 154 crossed Union street, did you notice engine 166 yet?

A. I noticed an engine switching up there, about the repair tracks, when our train passed in.

Q. Which side of the bridge?

A. They were passing to and fro across the bridge in the repair tracks.

Q. About how far from Union street?

A. It is about a thousand feet from Union street up to that—that is, — the center of Union street up it is about 1,150 feet to the three-throw switch they were using.

Q. The track that 166 was using?

A. Yes, sir.

Q. At the time engine 154 crossed Union street, or the train crossed Union street, how far were they across?

A. We had thirteen cars of coal; I was on the rear of the train; the train all passed up over Union street; I got off then at the three-throw switch.

Q. Did you step off while in motion?

A. Yes, sir.

Q. How fast was the train moving while you stepped off?

A. Very slow; I don't think to exceed two miles an hour.

Q. You stepped off the train and walked up with the train?

A. No, sir; I stepped off the train just as we passed the three-throw switch in order to throw that switch.

Q. How far did the cars go beyond the three-throw switch before the collision. What was the distance between the rear end of your train and the three-throw switch at the time of the collision?

A. We were aiming to get in off the main track on the split-switch; it would make about one hundred and forty feet.

Q. You got off there for the purpose of throwing the three-throw switch and allow them to enter?

A. Yes, sir; got off at the split-switch.

Q. Was that part of your duty there at that time?

93 A. Yes, sir.

Q. He got off at the split-switch and you at the three-throw switch?

A. Yes, sir.

Q. Magee was foreman of the crew?

A. Yes, sir.

Q. Did you hear a whistle blown after you got off?

A. Just as I jumped off he blew the whistle.

Q. Just as you jumped off?

A. Yes, sir.

Q. How soon after that was the collision?

A. The distance between where I got off and up to this split-switch.

Q. That would be about how many feet?

A. 140 feet.

Q. After the whistle was blown and before the collision?

A. Yes, sir.

Q. Now immediately after you jumped off—after you heard the whistle blown—did you see 166?

A. Yes, sir; I saw her there before I got off.

Q. What was she doing at the time you got off?

A. They were switching above there; — I got off they were moving west on the main track.

Q. At the time you got off?

A. Yes, sir.

Q. About how fast?

A. I could not tell; they were directly forward of me.

Q. You could not tell by the motion of the train?

A. No, sir.

Q. After you jumped off the whistle was blown and engine 154 moved about 140 feet?

A. Yes, sir.

Q. Then the collision took place?

A. Yes, sir.

Q. At the time of the collision about how fast was engine 154 moving, if at all?

A. They were moving very slow.

Q. What is the usual speed in handling a train up and down the yard there?

A. It is various; we go according to the city ordinances; we move, maybe, say, from the rate of one to five miles an hour.

Q. Was 13 cars of coal a heavy or light train?

A. Very heavily laden train.

Q. What is the condition of the grade from 10th street to Union street—up or down grade?

A. Up grade from 10th to Union street.

Q. What is the condition of the grade from Union street to the point of collision?

A. It is a little up, but a very little.

Cross-examination:

Q. You are still in the employment of the Missouri Pacific road?

A. Yes, sir.

Q. Were you subpœned to come here to court?

A. Yes, sir.

Q. Who served the subpœna?

A. The train-master.

Q. He just ordered you to come here?

A. Yes, sir.

94 Q. It was not a subpœna from the court; just an order?

A. I was subpœnaed on the trial and the subpœna was sent to him, and he informed me in regard to the subpœna on account of my being subject to his orders.

Q. You say in reference to this speed you went according to the city ordinances?

A. As a general thing, in passing through the city limits.

Q. Was this in the city limits where this collision took place?

A. I did not know the extent of the city limits at that time.

Q. Don't you know it was outside?

A. I could not state positively whether it was outside or not.

Q. How soon after the whistle you heard was the collision?

A. After I heard the whistle I suppose it must have been about 5 or 7 seconds, probably.

Q. How many feet were you away from the actual spot of the collision between the two engines? Where were you standing—how far away from them?

A. Well, I was about this three-throw switch. It is about 670 feet.

Q. You were 670 feet—about that?

A. Well, I can get at it [in] a little better shape. It is 190 feet from the three-throw switch, where I was standing, to the east end of the bridge, and it was about two car lengths east of this bridge, which would make it about 60 feet less.

Q. When you jumped off the car for the purpose of turning the switch was the whistle blown?

A. Not until after I got off the car.

Q. Did you calculate at the time—did you think at the moment of the occurrence—as to how many seconds occurred between the collision and the whistle?

A. That has come to my recollection since. I judge principally by the distance of the train, moving at the rate of speed the train was moving at the time I got off.

Q. You say the train was moving at a very remarkably slow rate?

A. Yes, sir.

Q. Not to exceed two miles?

A. No, sir.

Q. It moved how many feet after that?

A. About 140 feet.

Q. Was there any appreciable time that you distinguished yourself at that moment between the blowing of the whistle and the collision?

A. He blew the whistle several seconds; the train travelled that distance after he blew the whistle before the sound of the crash.

Q. That measurement and everything of that kind, the 190 feet, were made since—you informed yourself of since?

A. Yes, sir.,

Q. Did it occur to you at that time that there was any appreciable difference between or any appreciable length of time between the whistle and the collision?

A. Yes, sir; there was a difference in time.

Q. Was the whistle sounded at any place excepting this particular time you mentioned?

A. I believe the fireman blew the whistle leaving the lower yard.

Q. Would that be east or west of the depot?

A. It would be south of the Union depot.

Q. Then the whistle was not blown south of the Union depot until the time he did — south or except at the time of the collision?

A. Not to my knowledge.

Q. That is nearly a mile?

95 A. It is, I guess, over a mile.

Q. Something in that neighborhood?

A. Yes, sir.

Q. The engine going very slow, as you stated, was in the power of the person having charge of it, with the engineer to stop it within a very short distance if there was any danger ahead of him?

A. It would be owing to the "heft" of the engine how quick he could stop it.

Q. The engine going at the rate of two miles an hour, [is it] very easy to stop?

A. If you have got 13 cars *of* very heav-y laden — coal it will be very apt to — engine, considering the weight it did have, — have been stopped going at the rate of two miles an hour.

Q. Supposing it was the desire of the engineer to stop it as soon as possible; how soon could it have been stopped?

Objected to by defendant as not proper cross-examination.

Q. Did you go up to [the] scene of the wreck after the collision took place?

A. Yes, sir.

Q. Immediately?

A. Yes, sir; immediately.

Q. I understand you to say you were on the rear of the cars when you got off?

A. Yes, sir.

Redirect examination:

Q. Was it or not a frequent occurrence to meet trains on the same track and engines in switching to and fro in the yards?

A. Yes, sir.

Q. How frequently; every day, was that?

A. Very frequently passing through the yards, because the trains went out on the Eastern Division and had to pass through the yards in order to take their train out.

Q. These two engines, 166 and 154, met frequently on the track in making up of trains and moving cars to and fro in the yard?

A. Yes, sir; frequently.

Recross-examination:

Q. Was there any other train due or expected there at that time—any freight or passenger train—regular ones?

A. That I could not answer, because I just came here then, and I was not familiar with the time-card.

CHAS. WICKHAM recalled on behalf of defendant:

Q. What change, if any, has been made in the main track or side track between the bridge and Union street since this accident?

A. There has been no change in the main track.

Q. What change has been made in the side track?

A. No change made in that switch leading off the main track to the three-throw switch.

Q. Has the scale-track been changed?

A. No, sir.

Q. That is in the same condition?

A. Yes, sir.

Q. The main track in the same condition?

A. Yes, sir.

Q. The bridge in the same condition and in the same place?

A. Yes, sir.

Q. Union street in the same place?

A. Yes, sir.

96 Cross-examination:

Q. You say the switch has been moved west?

A. The scale-track switch has been changed; put farther west. There is a split-switch there in the place.

Q. You say it has been moved further west?

A. Yes, sir; I think about four feet. I don't know for certain whether it is or not.

Q. It is substantially in the same place it was?

A. Yes, sir.

Q. Does that connect with the main line—the switch you refer to?

A. Yes, sir.

Q. Is there any other switch between Union depot and the place—any other switch been changed?

A. No, sir.

Q. Any other track been changed?

A. No, sir.

The jury, on request of defendant, was permitted to view the tracks and grounds where the collision occurred without objection from either party.

And the above and foregoing was all the evidence introduced on the trial of the said case.

And thereupon the said defendant duly asked the court to give to the jury the following instructions, to wit:

Instructions Asked for by Defendant.

In the District Court of Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

1. The jury are instructed that the burden of proof is upon the plaintiff, and unless he has established his right to recover by a preponderance of evidence they will return a verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

2. The jury are instructed that if the plaintiff failed to exercise reasonable and ordinary care to avoid the injury complained of they will return a verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

3. The jury are instructed that if upon the whole evidence they find that the negligence and want of ordinary care upon the part of the plaintiff contributed directly or proximately to the injury complained of they will return a general verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

5. The jury are instructed that negligence is not to be presumed, but must be proven, and the plaintiff cannot recover on the ground of neglect or mismanagement of co-employees unless he has shown by a preponderance of the evidence that the employees, or
97 some of them, failed to exercise that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances.

Refused and excepted to.

D. MARTIN,
District Judge.

6. The jury are instructed that if they find from the evidence that the plaintiff and defendant were mutually in fault, or, in other words, if they find that negligence of the same nature in each party co-operated to produce the injury, the party sustaining the loss is without remedy.

Rufused and excepted to.

D. MARTIN,
District Judge.

7. If the plaintiff, by the exercise of ordinary care, might have avoided the injury complained of he cannot recover herein.

Refused and excepted to.

D. MARTIN,
District Judge.

8. The fact alone that said plaintiff was injured is not sufficient to prove negligence on the part of the defendant or any of its employees, and if plaintiff has shown no negligence except such as may be inferred from the fact that he was injured the jury will find for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

9. The jury are instructed that to authorize a verdict for the plaintiff they must be satisfied from the evidence that the alleged injury was caused by the culpable negligence of the defendant and without fault or negligence proximately contributing thereto on the part of the plaintiff.

Refused and excepted to.

D. MARTIN,
District Judge.

11. If the defendant was guilty of negligence, yet if the plaintiff, by the exercise of ordinary care, could have prevented the injury complained of and did not exercise such care, he cannot recover.

Refused and excepted to.

D. MARTIN,
District Judge.

12. The plaintiff was bound to exercise such care and prudence as was commensurate with the danger of the employment in which he was engaged, and if you find that, at the time of the injury complained of, the plaintiff was not exercising such care and prudence as was commensurate with the danger incident to the employment or by the exercise of such care and prudence he could have avoided the injury, then he cannot recover in this action.

Refused and excepted to.

D. MARTIN,
District Judge.

13. If the employment that plaintiff was engaged in was attended with danger the plaintiff, by engaging in such employment, assumed the hazards and ordinary perils incident to it, and if the injury was the result of an ordinary peril of such service he cannot recover herein.

Refused and excepted to.

D. MARTIN,
District Judge.

15. The jury are instructed that under the evidence and the pleadings in this case the plaintiff cannot recover, and they will return a general verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

98 16. And the jury are further instructed that if they find from the evidence that any of the co-employees were guilty of negligence, which contributed to the injury complained of, yet plaintiff cannot recover if it appears from the evidence that the carelessness or negligence of the plaintiff contributed directly, in whole or in part, to bring upon himself the injury complained of.

Refused and excepted to.

D. MARTIN,
District Judge.

18. The jury are instructed that to entitle the plaintiff to recover on the ground of negligence or mismanagement of any co employee of the defendant they must find from the evidence that there was negligence or mismanagement in fact, and it devolves on the plaintiff to show affirmatively and by a preponderance of the evidence wherein such negligence or mismanagement existed, and they are not to assume it did exist from the mere fact that plaintiff was injured at the time or under the circumstances claimed in his petition.

Refused and excepted to.

D. MARTIN,
District Judge.

19. The jury are instructed that if they find from the evidence that the plaintiff by his own carelessness or negligence, directly or indirectly, contributed, in whole or in part, to bring upon himself the injuries from which he claims to have sustained damages, then he cannot recover.

Refused and excepted to.

D. MARTIN,
District Judge.

20. The jury are instructed that the term mismanagement or negligence of the defendant's agents, engineer, or other employee in order to render defendant liable for damages done to plaintiff does

not mean that a mere failure of any such employee to exercise extraordinary diligence or that slight diligence only would be sufficient to demand at the hands of the jury a verdict for the plaintiff.

Refused and excepted to.

D. MARTIN,
District Judge.

21. The jury are further instructed that if they find from the evidence that the defendant and its employees in the management of its trains, cars, and engine at the time and under all the circumstances exercised ordinary care, then defendant is not liable to plaintiff for any claimed damages and the jury will return a verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

22. The jury are further instructed that the law presumes that every adult is endowed with sufficient reason to enable him to exercise ordinary prudence and care, and the law demands that every such person will employ reasonable means to foresee and prevent injury, and if the jury find from the evidence that the plaintiff knew, or should by the exercise of ordinary care and prudence in the use of eyes and faculties have seen or ascertained, that there would probably be a collision between said two engines, and that by the exercise of ordinary care and prudence he would have prevented the same, but failed to exercise such precaution, then such act of plaintiff would so far contribute to the injury complained of as to prevent a recovery herein.

Refused and excepted to.

D. MARTIN,
District Judge.

99 23. If the jury find from the evidence that plaintiff, by the exercise of ordinary care, could have avoided the alleged injury to himself, and failed to exercise such care, and was guilty of ordinary negligence contributing directly to the injury, then this would defeat his recovery herein, and the jury will find for defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

24. The jury are instructed that if they find from the evidence that plaintiff by his own carelessness and negligence directly contributed in whole or in part to bring upon himself the injuries complained of, then plaintiff cannot recover.

Refused and excepted to.

D. MARTIN,
District Judge.

25. The jury are instructed that if they find from the evidence that plaintiff entered defendant's employment as a fireman, this was an implied assurance to defendant that he (plaintiff) possessed the requisite skill to do and perform the work the company wanted done, and it had the right to presume that in taking such employment plaintiff assumed all ordinary hazards arising from the performance of the duties of his voluntary engagement as fireman, and plaintiff, in the performance of his duties, was required to exercise the same care and vigilance to avoid being injured as that demanded of defendant to prevent injuring him.

Refused and excepted to.

D. MARTIN,
District Judge.

26. The jury are instructed that if they find from the evidence that the want of ordinary care on the part of the plaintiff in any degree contributed to the injury complained of the plaintiff cannot recover herein.

Refused and excepted to.

D. MARTIN,
District Judge.

27. The jury are instructed that if they find from the evidence that plaintiff ought, in the exercise of ordinary care and caution, to have seen the danger and avoided it, and his omission to do so directly contributed, in whole or in part, to the injury complained of, then he was guilty of such negligence as will prevent a recovery in this action, even though the jury may further find from the evidence that the co-employees of plaintiff, servants of defendant, by their negligence contributed directly in part to the injury complained of.

Refused and excepted to.

D. MARTIN,
District Judge.

28. The jury are instructed that if they find from the evidence that plaintiff was employed as fireman of engine No. 166, and that as such it was part of his duty to look out for signals and for obstructions on the track in the direction his engine was moving, and did not look out for such obstructions, and by the exercise of reasonable and ordinary care would have seen engine *engine* No. 154, and ought by the exercise of reasonable and ordinary care have checked the speed of his engine in time to have prevented a collision, and did not exercise such reasonable and ordinary care, in consequence of which he was injured, he cannot recover herein.

Refused and excepted to.

D. MARTIN,
District Judge.

100 29. In order for the plaintiff to recover it is not sufficient for him to establish that he was injured by or through the

negligence of defendant, its officers or employes, but such recovery, if any, must be based solely upon the specific acts of negligence alleged and set forth in the petition, and such allegations of negligence must be established by the plaintiff by the weight or preponderance of the evidence; otherwise your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

30. The jury are instructed that the question in this case is not whether one party is guilty of greater negligence contributing to the injury than the other. It is not the duty of the jury to compare the negligence of any of the employees of the defendant with the negligence, if any, of the plaintiff, for if the plaintiff was guilty of ordinary negligence, which contributed directly, in whole or in part, to the injury complained of, he cannot recover herein, even if the jury should find from the evidence that the agents, servants, or employees of the defendant were guilty of the greater negligence contributing directly to the injury complained of.

Refused and excepted to.

D. MARTIN,
District Judge.

31. The jury are instructed that if they find from the evidence that the defendant or any of its agents or employees were guilty of negligence which contributed to the injury, and that the plaintiff by the exercise of ordinary care under the circumstances might have avoided the consequence of such negligence, but did not, the case is one of mutual fault and the law will neither cast all the consequence upon the defendant nor will it attempt any apportionment thereof.

Refused and excepted to.

D. MARTIN,
District Judge.

34. The jury are instructed that if they find from the evidence that plaintiff, as fireman, was under the immediate control and direction of the engineer in charge of the engine on which plaintiff was engaged at the time of the injury, and that the failure of each said engineer and plaintiff to exercise reasonable and ordinary care to prevent the injury complained of was the cause of the injury, then the plaintiff cannot recover, and your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

35. The jury are instructed that if they find from the evidence that said plaintiff, as fireman, and the engineer on engine No. 166 were in the proper discharge of their duties jointly responsible for

the management of said engine, and that the service of each was necessary for the proper operation thereof, then they were so far identified with each other that any neglect or mismanagement of either contributing directly, in whole or in part, to the injury complained of would be a bar to the plaintiff's right to recover herein, and in that event your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

101 36. The jury are instructed that in this case there is no evidence of any wanton or wilful negligence on the part of the defendant or any of the fellow-servants of the plaintiff, and if the jury find from the evidence that there was any want of ordinary care, however slight, on the part of the plaintiff contributing in whole or in part to the injury complained of, the plaintiff cannot recover, and your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

37. The jury are instructed that if they find from the evidence that the negligence of the plaintiff concurred with that of any other employee to produce the injury complained of alleged in the plaintiff's petition, the plaintiff cannot recover, and your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

38. The jury are instructed that the plaintiff is concluded by the allegations of his petition and cannot by evidence dispute any fact admitted in his petition.

Refused and excepted to.

D. MARTIN,
District Judge.

39. The jury are instructed that the plaintiff must rely upon and is bound by the case made by his petition; and, having alleged the specific acts of negligence which he claims caused the injury, [he] cannot now rely upon or base his right to recover herein by reason of any other acts of negligence than such as are specifically alleged in his petition.

Refused and excepted to.

D. MARTIN,
District Judge.

40. The jury are instructed that the employees of defendant were not required to exercise extraordinary care to prevent the injury complained of, but were only required to exercise reasonable and ordinary care, such care as prudent men would ordinarily exercise

under like circumstances; and if the jury find from the evidence that such employees did exercise reasonable and ordinary care the plaintiff cannot recover, and your verdict should be for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

41. And in determining the question as to whether the engineers did exercise ordinary care to prevent the injury complained of, the jury have a right, and it is their duty, to take into consideration the probability of danger to such engineers and of being himself injured in case of collision.

Refused and excepted to.

D. MARTIN,
District Judge.

42. In the absence of testimony proving or tending to prove that the employees failed to exercise reasonable and ordinary care to prevent the injury complained of, the law presumes they did exercise that degree of caution required of them under the circumstances.

Refused and excepted to.

D. MARTIN,
District Judge.

102 43. The jury are instructed that under the pleadings in this case the plaintiff cannot recover, and they will return a verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

44. The jury are instructed that under the evidence in this case the plaintiff cannot recover, and they will return a verdict for the defendant.

Refused and excepted to.

D. MARTIN,
District Judge.

45. The jury are instructed that if they find from the evidence that the plaintiff was injured through the carelessness of a fellow-servant the plaintiff cannot recover.

Refused and excepted to.

D. MARTIN,
District Judge.

46. The jury are instructed that if they find for the plaintiff they can only allow him such damage as will be compensation for the injury complained of; they cannot allow any speculative damage

nor any damage that is not susceptible of computation or reasonable ascertainment.

Refused and excepted to.

D. MARTIN,
District Judge.

47. In ascertaining the amount of plaintiff's recovery, if the jury find that he is entitled to recover, the jury will take into consideration the age of the plaintiff and the amount he earned previous to such injury.

Refused and excepted to.

D. MARTIN,
District Judge.

EVEREST & WAGGENER,
Attorneys for Defendant.

Which instructions, and each thereof, the court refused to give; to which action of the court in refusing to give said instructions, or either or any thereof, said defendant at the time specially excepted.

And thereupon the court, of its own motion, subject to the objection of the defendant, gave to the jury the following general charge in writing:

Charge of the Court to the Jury.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

GENTLEMEN OF THE JURY:

1. This action is brought by the plaintiff, Patrick Mackey, against the defendant, The Missouri Pacific Railway Company, to recover damages in the sum of $20,000 for personal injuries alleged to have been sustained by the plaintiff, and for which he claims that the defendant is liable.

The defendant denies any liability to the plaintiff, and it will be for you to determine from the evidence under the rules of law, which will now be stated to you, whether the plaintiff is entitled to recover any sum of money from the defendant or not; and, if he is entitled to recover, then how much.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

103 2. The substance o the complaint made by the plaintiff against the defendant, so far as it is deemed necessary to state the same to you, is that on February 11th, 1882, he was in the employment of the defendant, a railroad company and corporation, as

a fireman upon a switch engine in the yards of the company, at and near the city of Atchison, in this county and State, and that while so engaged upon said engine, and while the same was going backward and eastward, another engine of the defendant, going forward and westward at a dangerous and unusual rate of speed, and without giving any warning of its approach by ringing the bell, blowing the whistle, or any other manner, was run into and collided with the engine upon which the plaintiff was engaged, and that by reason of the negligence and carelessness of the employees of the defendant other than the plaintiff, and the management of the said engines and the trains drawn by them causing said collision, the plaintiff was seriously injured in his person.

The defendant admits that it is a railway company and corporation, but denies each and every other claim made by the plaintiff.

The defendant also alleges that if the plaintiff received or suffered any injuries, as claimed, the same was the result of the carelessness and negligence of the plaintiff, and his failure to exercise ordinary care and to properly attend to his duties as a fireman.

The allegations made by these defendants as to the carelessness and negligence of the plaintiff are denied by the plaintiff in his reply. Some other issues are made by the pleadings to the effect that certain employees of the defendant were incompetent, and that the defendant had knowledge of such incompetency, the allegations made in this regard being denied by the defendant; but no evidence has been offered in support of the plaintiff's allegations on this point, and this will relieve you from any consideration of this part of the issues made by the pleadings.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

3. The following facts are undisputed in the evidence, and may be taken as true:

The defendant is a railway company and corporation having control of two track yards in and adjacent to the city of Atchison, commonly designated as the upper yards and the lower yards, and in the day time of February 11th, 1882, the defendant was using and operating two switch engines with their crews in said yards in moving and switching cars, the engine designated as 166 being used chiefly in the upper yard, and the other, known as number 154, being principally used in the lower yard, although each engine also hauled or pushed cars from one yard to the other, and both engines and their crews were used in the common employment of the defendant, and the tracks were used in common to facilitate the business of the defendant.

The plaintiff was an employee of the defendant, as fireman on engine No. 166, and Jesse Craft was the engineer. William Bergen was engineer and James Riley was fireman on engine No. 154.

About 11 o'clock a. m. of said day engine No. 166, although headed westward, was going backward and eastward, pulling some cars that

were to it westward, while engine No. 154 headed westward and — going forward and westward, hauling some cars that were east of it, when the two engines collided, the front part of No. 154 with the back part and tender of No. 166, and the plaintiff's right foot and ankle were caught between parts of the wreck of No. 166 and badly crushed, so that it became necessary to amputate the same, which was done on that day.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

104 4. The facts hereinbefore set forth in instruction 3 as undisputed are not enough alone to charge the defendant with liability to the plaintiff for the personal injuries complained of. In order to make out a *prima facie* case for the plaintiff, it must appear by a preponderance of the evidence that said collision was caused by the negligence or carelessness of those employees of the defendant, other than the plaintiff, who were operating said two colliding engines and their trains.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

5. At the common law a master or employee could not be held liable for an injury sustained by one servant by reason of the mere negligence of a fellow-servant engaged in the same common employment, the negligence of the fellow-servant not being deemed in such case the negligence of the master, and such was the law of this State up to 1874, but at said time this rule of the common law was abrogated, so far as it related to railroad companies and their employees in this State, by a statute which reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage."

This enactment so far modifies and changes the common law that a servant or employee of a railroad company may maintain an action against such railroad company for an injury received while in the line of his employment through the negligence of a fellow-servant or employee engaged with him in the same common work of the master or employer, unless such injured servant or employee has himself been guilty of negligence or want of ordinary care which has directly contributed to produce the injury complained of.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

6. If the plaintiff has a right of action against the defendant on account of said personal injuries, it is under said statute of 1874 for alleged negligence of his fellow-servants, and the first question for your decision will be whether or not the plaintiff has made out such a case *prima facie*. If this question is decided in the affirmative, then the next question will be whether the plaintiff was or was not himself guilty of such contributory negligence as to defeat such *prima facie* right of recovery.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

7. Negligence is not to be presumed, but must be proved, and where the evidence in an action for damages against a railroad company under said statute of 1874 shows that all of the employees having authority or duty in the premises exercised towards the injured employee that degree of care and diligence which prudent persons would ordinarily exercise under like circumstances, in such case no liability is established against the railroad company, and contributory negligence of the injured employee bars a recovery under the statute as in other cases.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

105 8. The burden of proof rests upon the plaintiff in the first instance, and it devolves upon him to show by a preponderance of the evidence that at the time of receiving the injuries complained of he was in the line of his duties as such employee and fireman, and that such injuries were received by reason of the negligence of his fellow-servants who were engaged in operating said two engines and their trains.

If these facts are shown by a preponderance of the evidence then the plaintiff will be entitled to recover, unless it also appears by a preponderance of the evidence that the plaintiff was not in the exercise of ordinary care, and that such want of ordinary care on his part contributed to produce the injury, in which case he cannot recover.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

9. It was the duty of the plaintiff and his fellow-servants who were engaged in the management and operation of said two engines and their trains to exercise ordinary care and diligence to avoid injury to each other. Ordinary care and diligence is that degree of care and diligence which men in general exercise in respect of their own

concerns under like circumstances. Ordinary negligence is the want or lack of ordinary care and diligence.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

10. And if you find from the evidence that the plaintiff and one or more of his fellow-servants engaged in the management and operation of said two engines and trains were mutually in fault in causing or allowing or not avoiding said collision, or, in other words, if you find that negligence of the plaintiff and of some one or more of his fellow-servants engaged in the management and operation of said engines and trains co-operated together to produce the injury, then the plaintiff is not entitled to recover, and the mere fact that the plaintiff was injured while in the service and employment of the defendant does not make out a case in his favor, nor show negligence on the part of the defendant nor of the fellow-servants of the plaintiff.

To the giving of which and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

11. Both the plaintiff and his fellow-servants engaged in the management and operation of said two engines and their respective trains were under obligations to each other to conduct themselves in such a manner and with such a degree of care as men in general would exercise under like circumstances.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

12. The plaintiff in accepting employment as a fireman upon one of the defendant's yard engines assumed the ordinary hazards of that occupation. It was his duty to take ordinary care to avoid danger to himself, and he had a right to assume that his fellow-servants engaged in the management and operation of said two engines and their respective trains would exercise ordinary care toward him; but he had no right to assume that they would exercise extraordinary care or the highest degree of diligence to avoid injury to him.

106 To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

13. If you find that the engineer, Jesse Craft, and the plaintiff, as fireman, were in the joint management of said engine No. 166, and

while the plaintiff was in the exercise of ordinary care he received the injuries complained of through and by the negligence and want of ordinary care on the part of said engineer, then the plaintiff is entitled to recover, as the negligence of the engineer cannot in such case be imputed to the plaintiff, but if you find that said engine No. 166 was under such joint management of the engineer and plaintiff as fireman, and that the plaintiff received the injuries complained of by reason of the mutual negligence of himself and said engineer, then the plaintiff is not entitled to recover.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

14. And if the jury find from the evidence that under the circumstances it was the duty of the plaintiff to look out for obstructions in the direction that his engine was running, and that if he had been in the exercise of ordinary care he would have seen engine No. 154 in time to have avoided the collision, but that he negligently omitted to keep a proper lookout, and his injury was the result of said negligence on his part, or the result of said negligence on his part, together with the negligence of his fellow-servants, then the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

15. In order to entitle the plaintiff to recover you must be satisfied by the evidence that there was some negligence or mismanagement, in fact, on the part of his fellow-servants, as alleged in the plaintiff's amended petition, in operating said engines and their respective trains, or one of them, and it devolves upon the plaintiff to show affirmatively and by a preponderance of the evidence wherein such negligence or mismanagement existed, and you are not to assume that it did exist from the mere fact that the collision occurred whereby the plaintiff was injured.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

16. If you find that the plaintiff is entitled to recover, then the next question for you to consider will be the amount of his recovery. It cannot exceed $20,000, for that is the amount claimed in the plaintiff's amended petition, and it may be any sum between that and nominal damages, which shall seem fair and just in view of the injuries sustained without regard to the character of the parties as to the needs of the plaintiff or the ability of the defendant to pay.

There is no exact rule for the computation of damages in cases for personal injuries; but our supreme court has said that "the measure of recovery is for the loss of time, for expenses, and for physical pain which had resulted up to the commencement of the action, and if the plaintiff is still disabled from such injury such further damages as appears from the evidence to be the natural and probable result of such injuries."

Of course you should consider the age, health, and physi-
107 cal condition of the plaintiff before and since the injury, his former employment and wages, and his ability to earn money before the injury, and his present and prospective future capacity and ability to work and earn money, and you should, in fact, consider all the circumstances developed by the evidence admitted in the case which tend to show the extent of the plaintiff's injuries and his pain and suffering and pecuniary loss resulting therefrom.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

17. You are the exclusive judges of all questions of fact and of the weight of the evidence and of the credibility of the witnesses, and if you find from the evidence that any witness has testified willfully corruptly and falsely to any materially fact in this case, then it is your province to determine how much or whether the whole of his testimony should be disregarded.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

18. Two forms of verdict will be presented to you, one suitable for finding in favor of the plaintiff and for assessing the amount of his recovery, and the other suitable for finding in favor of the defendant.

Certain particular questions of fact will also be presented to you for your answer. It will be your duty to answer in writing each question of both series in accordance with the evidence on that particular point without special reference to the effect of such answer upon your general verdict, and at the bottom of each series the name of your foreman should be signed in like manner as your general verdict.

After you have heard the arguments of counsel the case will be submitted for your determination and decision under the law and the evidence.

To the giving of which and each and every part thereof said defendant at the time duly excepted.

D. MARTIN,
District Judge.

And the said defendant at the time duly objected to each and every sentence, line, and paragraph of said general charge of the court to the jury, which objection was by the court overruled.

To which and each thereof at the time said defendant duly excepted.

And the above and foregoing were all of the instructions or charge given to the jury by the court on the trial of said case.

And at said time and before the said case was submitted to the jury the said plaintiff requested the court to submit to the jury particular questions of fact, as hereinafter copied on pages 125 to 130 of this record, without the answers thereto, which are written in red ink in this record, and as so written in red ink were answered and returned by the jury.

To the giving of which questions of fact and each thereof, except Nos. 6, 7, 10, 11, 12, 14, 15, 16, 17, 21, 22, 23, 24, 32, 33, the said defendant objected, which objection was by the court overruled and said particular questions of fact were submitted to the jury.

To which action of the court defendant at the time specially excepted.

108 And thereupon the court also submitted to the jury, upon the request of said defendant, the particular questions of fact hereinafter copied on pages 130 to 139 of this record, as hereinafter copied, except the answers thereto, which, when submitted, were in blank, but as now appear in this record as returned by the jury are in red ink; and, in addition thereto, the said defendant asked the court to submit to the jury question marked number 52, which read as follows: "If you find, from the evidence, that the plaintiff exercised reasonable and ordinary care to prevent the collision of the said two engines and the injury complained of, state in what particulars he exercised such care and diligence," but which question of fact the court refused to submit to the jury.

To which action of the court defendant at the time duly excepted.

And, in addition thereto, asked the court to submit question No. 57, in the following form:

"At the time that the engineer in charge of engine No. 154 blew the danger signal and reversed his engine, at what rate of speed was his engine running?"

Which request of the said defendant the court refused to comply with.

To which action of the court the said defendant at the time duly excepted, and the court thereupon modified such question 57 as the same now appears on page 136 of this record, and, as so modified, gave the same to the jury.

And at said time the said defendant also requested the court to give question No. 58 in the following form:

"Did the plaintiff hear the danger signal given by the engineer in charge of engine No. 154 by blowing the whistle thereon?"

Which particular question of fact the court refused to submit to the jury, to which action of the court defendant at the time duly excepted. And thereupon the court, of its own motion, modified such particular question of fact and gave the same as so modified, as now appears of record on page 136 of this record.

And at said time said defendant also asked the court to give the following particular question of fact, to wit, No. 59:

"Did the failure to ring the bell on engine 166, as it was backing east on said main track, contribute directly, wholly, or in part to the collision between said two engines?"

Which particular question of fact the court refused to submit to the jury. To which action and refusal of the court said defendant at the time duly excepted, and the court thereupon, of its own motion, modified such particular question of fact and gave the same as modified, as now appears of record on page 136 of this record.

And at said time said defendant also asked the court to submit the following question, to wit, No. 60:

"Did the plaintiff know that it was dangerous and reckless for engine No. 166 to be backed east at the rate of speed it was being backed at the time of the collision and shortly before, while the engineer and himself were each looking west, without the ringing of the bell?"

Which particular question of fact the court refused to submit to the jury. To which action and refusal of the court said defendant at the time duly excepted.

And the defendant also asked the court to submit to the jury the following particular question of fact, to wit, No. 67:

"Did he then know that cars and locomotive engines were being moved and propelled through said yards and to and fro over
109 said track frequently and many times each day?"

Which particular quesion of fact, as so asked by said defendant, the court refused to submit to the jury; to which action and refusal of the court the said defendant at the time duly excepted.

And thereafter the said jury, on, to wit, 20th day of June, A. D. 1884, retired under charge of a sworn officer to consider of their verdict; and, after deliberation thereon, returned into court, and through their foreman presented to the court the following verdict, to wit:

Verdict.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

We, the jury duly empanneled, charged, and sworn in the above-entitled cause, do upon our oaths find the issue for the plaintiff, Patrick Mackey, and assess the amount of his recovery at the sum of $12,000.

N. E. HOWELL, *Foreman.*

As also their answers to the particular questions of fact submitted to them by the court, with their answers thereto, which particular questions of fact are hereinafter copied in this record on pages 125 to 139, inclusive—

The answers so made and found by the jury thereto being now written in red ink to distinguish the same from the particular questions of fact when submitted to the jury.

Which said particular questions of fact were submitted to the jury without answers thereto, and the answers to the same as now appear in red ink, as hereinafter copied, were and are the answers to the same as so found and made by the jury, and with their general verdict returned into court.

And thereafter, to wit, the 21st day of June, 1884, and within three days of the rendition of said verdict and special questions of fact, said defendant duly filed its motion for judgment on the said findings of fact, notwithstanding the general verdict of the jury for reasons in said motion contained.

Which motion is in words and figures as follows, to wit:

Motion for Judgment.

In the District Court, Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes said defendant and moves the court for judgment on the pleadings and findings of fact of the jury, notwithstanding the general verdict of the jury, for the following reasons, to wit:

1st. Because the defendant is entitled to judgment on the pleadings and findings of fact.

2nd. Because the plaintiff is not entitled to judgment.

EVEREST & WAGGENER,
Att'ys for Deft.

110 Which, being argued by counsel and considered by the court, was overruled; to which action, ruling, and decision of the court said defendant at the time duly excepted.

And thereupon and forthwith, and within three days of the rendition of said judgment, and within due and proper time, said defendant duly filed its motion for a new trial, for reasons in said motion contained, which motion is in the following words and figures, to wit:

Motion for a New Trial.

District Court, Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now comes the said defendant and moves the court to set aside the verdict of the jury and grant a new trial herein for the following reasons, to wit:

1st. Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

2nd. Irregularity in the prevailing party, the plaintiff, by which the defendant was prevented from having a fair trial.

Third. Misconduct of the jury.

Fourth. Misconduct of the plaintiff.

Fifth. Accident and surprise, which ordinary prudence could not have guarded against.

Sixth. Excessive damages, appearing to have been given under the influence of passion and prejudice.

Seventh. Error in the assessment of the amount of recovery being too large.

Eighth. That the verdict of the jury is not sustained by sufficient evidence.

Ninth. That the verdict of the jury is contrary to law.

Tenth. That the answers of the jury to the particular questions of fact are inconsistent with each other and are inconsistent with the general verdict of the jury.

Eleventh. Newly discovered evidence, material for the party defendant, which it could not with reasonable diligence have discovered and produced at the trial.

Twelfth. Error of law occurring at the trial and duly excepted to by the defendant at the time.

Thirteenth. That the court erred in refusing to give instructions prayed for by defendant.

111 Fourteenth. That the court erred in giving to the jury erroneous and improper instructions *to the jury.*

Fifteenth. That the court erred in instructing the jury that the defendant was liable to the plaintiff for injuries by him sustained in consequence of the negligence of a fellow-servant and coemployee of the plaintiff.

Affidavits, oral, and record evidence will be used in support of this motion on the hearing of the same.

EVEREST & WAGGENER,
Attorneys for Defendant.

And said motion, being argued by counsel and considered by the court, was by the court overruled; to which action, ruling, and decision of the court said defendant at the time duly excepted.

And thereupon, over the objection of said defendant and subject to its exception, the said court entered judgment against the said

defendant and in favor of said plaintiff for the sum of $12,000 (twelve thousand dollars) and costs of suit, and ordered the following journal entry of said judgment and proceedings to be made, to wit:

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

JUNE 20TH, 1884.

Now in this case the jury retired under charge of a sworn officer to consider of their verdict and the answers to the special questions of fact submitted to them for answers, and afterwards returned into court, and through their foreman presented to the court their said verdict, together with the special questions of fact submitted to them for answer.

Said verdict is as follows, to wit:

Verdict.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

We, the jury duly empanneled, charged, and sworn in the above-entitled cause, do upon our oaths find the issue for the plaintiff, Patrick Mackey, and assess the amount of his recovery at the sum of twelve thousand dollars.

N. E. HOWELL, *Foreman.*

In the District Court of Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

1. What was the plaintiff doing at the time of the injury?

Answer. In act of sitting down.

112 2. Was the plaintiff a strong, able-bodied man at the time of the injury?

Answer. Yes.

3. Was Mackey in the performance of his duty as the employee of the defendant at the time he received the injuries complained of in the use of ordinary care?

Answer. Yes.

4. Could the engineer or fireman of engine No. 154, by exercising ordinary care, have prevented the injury received by the plaintiff?

Answer. Yes.

5. Was Mackey, the plaintiff, exercising ordinary care and prudence at the time he received the injury?

Answer. Yes.

6. What was the age of Mackey at the time he received the injury complained of.

Answer. 39 years old.

7. What was his physical condition at the time of the injury?

Answer. Good.

9. Was there any obstruction to prevent the engineer on engine No. 154 from seeing the other, No. 166, before the collision—just before the injury?

Answer. No.

10. How many switching yards did the defendant own and control at the time of the injury at Atchison, Kansas?

Answer. Two, upper and lower yards.

11. Was there an upper and lower yard?

Answer. Yes.

12. If more than one yard, in which yard was the plaintiff working at the time of the injury?

Answer. Upper.

14. What was the number of the engine the plaintiff was working with at the time of the injury?

Answer. 166.

15. Who was the engineer in charge of the engine that the plaintiff was working on at the time of the injury?

Answer. Jesse Craft.

16. In what portion of the yard was such engine usually employed at and before the injury?

Answer. In the upper yard.

17. Who was the engineer in charge of the yard engine No. 154 at the time of the injury?

Answer. William Bergen.

19. In what portion of the yards did engine number 154 usually work and operate before the injury?

Answer. Lower.

113 20. Where did engine number 154 come from just before the injury?

Answer. Lower yards.

21. Did engine number 154 have any loaded cars attached to the engine at the time of the injury; if so, how many?

Answer. Yes; 13.

22. Where were the loaded cars brought from which were attached to engine number 154 just before the injury?

Answer. From lower yard.

23. Where were the cars attached to engine number 154 being taken to at the time of the injury?

Answer. To the scale-track switch in upper yard.

24. What distance is it from where engine number 154 started with the loaded cars to the place where the injury occurred?

Answer. About one mile.

25. Did engine number 154 stop at any point after it started with the cars which were attached to the engine until the injury occurred?

Answer. No.

26. Was any whistle sounded by engine number 154 after it left the lower yard until just before the injury occurred?

Answer. No.

27. What was the distance between engine number 154 and engine number 166 at the time the whistle was sounded, if such whistle was sounded?

[Answer.] About 30 feet.

28. How long was it after the whistle was sounded before engine number 154 and engine number 166 came together?

Answer. 2 to 3 seconds.

29. Did the engineer of engine number 154, or the persons in charge of the train drawn by engine number 154, give any signal to apply the brakes until just before the injury?

Answer. No.

30. Was there any brakeman on the train drawn by engine number 154 at the time the injury occurred; if so, state how many?

Answer. No.

31. Were there any brakes applied by any brakeman or other person on the train drawn by engine number 154 just before the injury?

Answer. No.

32. Was it a clear or cloudy day at the time the plaintiff was injured?

Answer. Clear day.

33. For what distance east of the place where the injury occurred was the track straight?

Answer. About ¼ of a mile.

34. Could the engineer of engine number 154, after he first saw engine number 166 before the injury, by the use of ordinary care have avoided the collision with engine number 166?

114 Answer. Yes.

35. Were the persons in charge of the train drawn by engine number 154 at the time of the injury making an effort to get into side tracks near where the injury occurred?

Answer. Yes.

36. Were the persons in charge of engine number 154 with the train attached thereto attempting at the time or just before the injury to run the train up past and west of the place where the injury occurred in order to back into a side track with such a train?

Answer. Yes.

38. Was it customary in the yards at Atchison, Kansas, west of Union street to ring a bell when on side tracks switching cars?

Answer. No.

39. Was it the duty of Patrick Mackey, the plaintiff, as the fireman of the switch engine on the day the injury occurred, first to keep the fuel in the engine, and then after performing that duty to look out for signals from the men connected with the train?

Answer. Yes.

40. At the time the injury occurred was it the duty of the engineer to control the movements of the switch engine at Atchison, Kansas?

Answer. Yes.

41. On the day of the injury had the fireman on the switch engine at Atchison, Kansas, any knowledge how far an engine would be moved by the engineer one way or the other?

Answer. No.

42. Was the plaintiff doing his duty as fireman in what he was doing at and just before the injury?

Answer. Yes.

43. Could the engineer of engine number 154, by the exercise of ordinary care when he first saw engine number 166, have avoided the injury?

Answer. Yes.

44. At what distance east of the place of injury could the engineer of engine number 154 have stopped after he saw number 166?

Answer. 600 feet.

45. Did the engineer and persons in charge of engine number 154 on the morning of the injury know what business engine number 166 was engaged in the upper yard?

Answer. Yes.

46. Was the collision caused by the negligence of the engineer of engine number 154 observing number 166 and failing to stop his engine in time to avoid the collision?

Answer. Yes.

47. Was the plaintiff guilty of any negligence contributing to his injury?

Answer. No.

115 48. Could the engineers on 154 and 166, by the exercise of ordinary care, have avoided the collision and injury?

Answer. Yes.

49. Had the plaintiff as fireman on 166 the right or power to control the movement of the engine in any way?

Answer. No.

N. E. HOWELL, *Foreman.*

Special Questions of Fact to be Answered by the Jury.

In the District Court, Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

1. On February 11th, 1882, was the plaintiff in the employ of the defendant company as locomotive firemen?

Answer. Yes.

2. As such fireman was he required to work on switch engine number 166 in the yards of the defendant company at Atchison, Kansas?

Answer. Yes.

3. For what length of time prior to the 11th of February, 1882, had plaintiff been in the employ of defendant company as locomotive fireman?

Answer. 3 to 4 months.

4. On February 11th, 1882, what was the name of the engineer of switch engine number 166?

Answer. Jesse Craft.

5. Did the duties of such engineer and such fireman require them to be on said engine number 166 while the same was being run and operated?

Answer. Yes.

6. Is it usual or customary to run and operate a locomotive engine without the assistance of a fireman?

Answer. No.

7. On February 11th, 1882, just before and at the time of the injury complained of, were each said engineer Craft and the plaintiff servants and employees of said defendant company engaged in operating engine number 166?

Answer. Yes.

8. At the time of and previous to the injury to plaintiff complained of was the said plaintiff assuming to discharge the duties of locomotive fireman on said engine number 166?

Answer. Yes.

9. On said February 11th, 1882, was there any servant or employee of defendant company in charge of and operating said engine number 166 other than the plaintiff, who assumed to discharge the duties of locomotive fireman on said engine number 166?

116 Answer. No other fireman but him.

10. On said February 11th, 1882, between eleven and twelve o'clock a. m. of said day, was there a collision between said switch engine No. 166, on which plaintiff was employed as fireman, and said switch engine No. 154, belonging to said defendant company?

Answer. Yes.

11. At the time of and just before said collision was engine No. 166 headed west and on the main track of the railroad of said defendant company?

Answer. Yes.

12. At said time were there any cars attached to the rear or east end of said switch engine number 166?

Answer. No.

13. At said time were there any cars attached to the front or west end of said switch engine number 166?

Answer. Yes; 5 to 7.

14. If question number 13 is answered in the affirmative, state number of cars.

Answer. 5 to 7.

15. At the time of said collision was switch engine number 154 headed west on said main track?

Answer. Yes.

16. At said time were there attached on the east or rear end of engine number 154 13 cars then loaded with coal?

Answer. Yes.

17. State the name of the engineer who was in charge of and

operating said engine number 154 at the time of and before the collision.

Answer. William Bergen.

18. For what length of time, just prior to said collision, had he been engaged as a locomotive engineer?

Answer. Three to 4 years.

19. State name of fireman on engine number 154 at the time of collision with engine number 166.

Answer. James Reily.

20. Was said track on which said two engines were at place of collision a straight or curved track?

Answer. Straight.

21. As said two engines approached each other, just before the collision, was there any obstruction or anything between them to prevent the fireman on number 166 from seeing number 154?

Answer. Yes.

22. When said engines were about three feet apart, and up to the time of the collision, what rate of speed was engine number 166 running?

Answer. From four to six miles per hour.

117 23. Was said engine number 166 at said time backing east, having attached to the front or west end about 5 to 7 cars?

Answer. Yes.

24. At the time of said collision and before was there attached to and upon said engine No. 166 an engine bell?

Answer. Yes.

25. At said time was said engine bell in good order and proper condition?

Answer. Yes.

26. Are bells placed upon engines for the purpose of being used as a warning, and to give notice of the movements of the engine in order to prevent injury or accident?

Answer. Yes.

27. At the time of said collision and before was there a brake on said engine to be used by the fireman for the purpose of stopping the engine and controlling its movements and speed?

Answer. Yes, but out of repair.

28. How far was said brake from the proper position of the fireman on said engine?

Answer. No evidence.

29. About how many feet had engine number 166 backed east from the point where it came on to the main track until it came in collision with engine number 154?

Answer. About 300 feet.

30. During all the time that engine number 166 was on the main track and backing east until it came in collision with engine No. 54 was there anything to prevent plaintiff from seeing said engine number 154 and ascertaining that it was upon the main track, if he had looked in that direction?

Answer. Yes.

31. If question number 30 is answered in the affirmative, state

what there was to prevent plaintiff from seeing engine number 154 and ascertaining that it was on the main track, if he had looked in that direction?

Answer. Tender loaded with coal.

32. From the time that engine number 166 went upon the main track, and as it moved east up to the time of the collision, did the plaintiff look towards the east in the direction engine number 166 was moving?

Answer. No.

33. If question number 32 is answered in the affirmative, did plaintiff then see and know that engine number 154 was on the main track?

Answer. No.

34. During all the time that engine number 166 was backing east on said main track towards engine number 154, did plaintiff ring or cause the bell on engine number 166 to be rung?

Answer. Yes.

118 35. During the time that engine number 166 was backing east on said main track towards engine No. 154 did plaintiff in any manner attempt to stop the same or check the speed thereof by the use of the brake on said engine?

Answer. No.

36. If question number 35 is answered in the affirmative, state in what manner plaintiff attempted to stop same or check speed thereof.

Answer. ——.

37. Did said engine number 166 back east on said main track for some three or four hundred feet, just before the collision with engine number 154, at a speed of from four to six miles per hour, without the blowing of the whistle or the ringing of the bell thereon, and without any other signal whatever of its approach?

Answer. Yes, except tapping bell when starting.

38. If question number 37 is answered in the negative, state in what manner a signal was given from engine number 166 that it was approaching, and at what distance from engine number 154 such a signal, if any, was given?

Answer. ——.

39. As said engine number 166 was backing on said main track towards engine number 154, in what direction was the engineer on engine number 166 looking?

Answer. West.

40. Was he at said time looking west for the purpose of receiving signals from the yard men then on the north side of said train and west of engine number 166?

Answer. I don't know.

41. During said time did the plaintiff see and know that the engineer on number 166 was looking west for the purpose of receiving signals?

Answer. Don't know.

42. Was it the duty of the engineer on engine number 166 to look in the direction that signals were being given on his side of the engine?

Answer. Yes.

43. When an engineer is looking for and receiving signals on his side of the engine in an opposite direction from that in which his engine is moving, is it the duty of the fireman to look out and watch for obstructions on the track in the direction the engine is moving?

Answer. When not otherwise engaged.

44. If question number 43 is answered in the negative, then state what are the duties of a fireman under such circumstances.

Answer. ——.

45. Was engine number 166, just before and at the time of the collision, backing east for the purpose of putting cars on the side track on the north side of said main track?

Answer. Don't know.

46. Did plaintiff then know for what purpose engine 166 was being backed towards the east?

Answer. No.

119 47. Is it the duty of the fireman to ring the locomotive bell when necessary to be rung?

Answer. Yes.

48. If question number 47 is answered in the negative, state whose duty it is to ring the bell on the engine.

Answer. ——.

49. At the time of the collision, and during the time that engine 166 was backing east some two hundred feet before the collison, was any person or member of the crew belonging to the engine number 166 on the south side of the main track west of plaintiff?

Answer. Yes.

50. If question number 49 is answered in the affirmative give the name of person belonging to engine number 166 who was on the south side of main track at any time while engine number 166 was backing the two hundred feet immediately west of the place of the collision.

Answer. Ellsworth.

51. From the time that engine number 166 moved onto the main track, and while backing east towards engine number 154, did plaintiff do anything to prevent the collision between said two engines?

Answer. No.

53. Do you find that at the time of the collision the sun was shining?

Answer. Yes.

54. Shortly before the collision, and as soon as the danger became apparent to the engineer in charge of engine 154, did he give the usual and customary signal of danger by blowing the whistle on engine 154?

Answer. No.

55. Did he thereupon forthwith reverse his engine?

Answer. No.

56. What is the effect of reversing a locomotive engine?

Answer. Gives it a backward motion.

57. If questions 54 and 55 are both answered in the affirmative, then at the time that the engineer in charge of engine number 154 blew the danger signal and reversed his engine at what rate of speed was his engine running?

Answer. ——.

58. If question 54 is answered in the affirmative, then did the plaintiff hear the danger signal given by the engineer in charge of engine No. 154 by blowing the whistle thereon?

Answer. ——.

59. If question 54 is answered in the negative, did the failure to ring the bell on engine number 166, as it was backing east on said main track, contribute directly, wholly, or in part to the collision between said two engines?

Answer. ——.

61. Did the collision between engines 154 and 166 occur in the yards of defendant company?

Answer. Yes, on the main track.

62. If question number 61 is answered in the affirmative, do you find that on February 11th, 1882, engines and cars were passing to and fro over the tracks in said yards almost continually?

120 Answer. No.

63. Were said yards used for the purpose of making up trains of cars and for the purpose of switching cars to and from side and main tracks?

Answer. Yes.

64. How long had plaintiff worked in said yards as locomotive fireman just prior to February 11th, 1882?

Answer. 3 or 4 months.

65. As such fireman, did he pass to and fro over said track frequently and many times each day?

Answer. Yes.

66. Did plaintiff on February 11th, 1882, know for what purpose said yards and tracks were used?

Answer. Yes.

68. At the time of and shortly before the collision were there two or more yard men on the north side of said main track to the west of engine 166 who were giving signals to the engineer in charge of said engine 166?

Answer. Don't know.

69. Had engine number 154 come nearly to a stop at the time of the collision with number 166?

Answer. No.

70. If question number 69 is answered in the negative, then state at what rate of speed engine number 154 was moving at the time of the collision?

Answer. 4 to 6 miles per hour.

71. At the time of the collision and shortly before was engine number 154 moving up grade?

Answer. No.

72. Just before the engineer and the employees in charge of engine number 154 discovered engine number 166 on the main track was

engine number 154 moving at a rate of speed exceeding four to six miles an hour?

Answer. No.

73. At the time the engineer in charge of engine number 154 first discovered engine 166 ahead of him, as engine number 154 moved west on said track, do you find that engine number 166 was standing still?

Answer. No.

74. If question number 73 is answered in the negative, do you find that engine number 166 was moving towards the east and in the direction of number 154?

Answer. Don't know.

75. From the time that engine number 166 started to move east did its speed continue to increase until the collision with engine number 154?

Answer. Yes.

76. From the time that the engineer and employees in charge of number 154 first saw engine number 166 ahead of them on the main track backing towards the east did the speed of engine
121 number 154 slacken up and continue to be decreased until the time of the collision?

Answer. No.

77. As soon as the danger of a collision between said two engines became apparent or probable to the engineer in charge of engine No. 154, did he use all the power then under his control by blowing the danger signal, reversing his engine and giving it a backward motion in order to prevent a collision?

Answer. No.

78. Previous to the said injury to the plaintiff had he earned to exceed forty-three dollars per month after the year 1870?

Answer. No—but in years 1866, 1867, and 1868 he earned from sixty to ninety dollars per month.

79. If question number 78 is answered in the affirmative state what amount in excess of forty-three dollars per month he had ever earned prior to said injury?

Answer. See answer to 78.

80. Do you find that the failure of the plaintiff to exercise ordinary care proximately contributed to the injury complained of?

Answer. No.

81. At the time that the danger of a collision became apparent or probable to the engineer in charge of engine number 154, when he gave the danger signal and reversed his engine, how far apart were the said two engines?

Answer. About 30 feet when the signal was given.

82. Were any brakes applied to the train drawn by engine number 166 just prior to the collision?

Answer. No.

83. Is it the imperative duty of employees in charge of engines and trains in yards to pay attention to all signals of danger when heard?

Answer. Yes.

84. Are danger signals given for the purpose of preventing accidents?

Answer. Yes.

85. Did the engineer in charge of engine number 154 when the danger of a collision became probable or apparent in order to prevent the same give the usual signal of danger by blowing the whistle?

Answer. No.

86. If you find that the engineer in charge of engine number 154, when the danger of a collision became probable or apparent, gave and sounded the danger signal, was this the proper course to pursue?

Answer. Don't so find.

87. If you find that the engineer in charge of engine number 154 when the danger of a collision became probable or apparent reversed his engine to prevent a collision, was this the proper course for him to pursue?

Answer. Don't so find.

88. As engine number 166 moved east on the main track, was there any brakeman or other employees than plaintiff and the engineer on said train?

122 Answer. No.

89. Did the plaintiff know, as said engine number 166 moved east on the main track, that there was no other employee on said train drawn by engine number 166 except himself and the engineer?

Answer. No.

90. Was plaintiff's leg amputated some ten to twelve inches below the knee?

Answer. Yes.

N. E. HOWELL, *Foreman.*

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

JUNE 28TH, 1884.

Now comes the defendant, by its attorneys, Everest and Waggener, and presents its motion for judgment herein on the conclusions of fact as found by the jury, which motion, after due argument by counsel and consideration by the court, is overruled, the defendant excepting.

And thereupon the defendant presents its motion for a new trial herein, for reasons in said motion contained, which motion, after due argument by counsel and consideration by the court, is overruled, *and* the defendant excepting.

It is therefore considered and adjudged by the court here that the plaintiff, Patrick Mackey, have and recover of and from the defendant, The Missouri Pacific Railway Company, as well the said sum of twelve thousand dollars ($12,000), the sum so as aforesaid found due, as also all costs herein, taxed at $——, and that execution issue for the same.

And thereupon the defendant is allowed sixty days to make and serve a case made for the Supreme Court, and the plaintiff is allowed ten days thereafter to suggest and serve amendments, said case to be settled on five days' notice by either party, and execution is thereupon stayed for ninety days.

And the above and foregoing is here now submitted as a case made for the Supreme Court, containing all the pleadings in said case, all of the evidence, demurrer to the evidence, all of the instructions of the court to the jury, findings of fact and answer of the jury thereto, journal entry of judgment, and is a full and complete transcript and record of said case.

EVEREST & WAGGENER,
Attorneys for Defendant.

We, the undersigned, attorneys of record for plaintiff, Patrick Mackey, do hereby acknowledge service of the within and foregoing case made to have been duly made on us this 28th day of July, A. D. 1884.

THOMAS P. FENLON,
JOHN TOMLINSON,
Attorneys for Plaintiff.

123 In the District Court of Atchison County, State of Kansas.

PATRICK MACKEY, Plaintiff,

vs.

THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Now, on this 13th day of August, A. D. 1884, before the undersigned, judge of said court, appeared said plaintiff, by his attorneys, John C. Tomlinson and Thomas P. Fenlon, and said defendant, by its attorneys, Everest & Waggener, and, it being made to appear to me that said defendant did in due time make and serve a case made upon the said plaintiff, as permitted by the order of the court herein, and that the said plaintiff did in due time thereafter suggest amendments thereto, and each party being now here present, having been duly notified that such case made would be settled and signed by me on this day, the within and foregoing was allowed and settled and is hereby certified by me to be a true and perfect case made herein, and as containing all the pleadings on which the case was tried, all of the evidence, instructions of the court, verdict and findings of fact of the jury, and journal entry of judgment, and a true and perfect transcript of the record of said case, and the same is by me here allowed, settled, and signed as such case made, and the clerk of said court is directed to attest the same with his official seal and signature.

Done by me at chambers this 13th day of August, A. D. 1884.

D. MARTIN,
Judge of the District Court, Second Judicial District, within and for Atchison County, Kansas.

I, W. W. Church, clerk of the district [court] of the second judicial district within and for the county of Atchison, State of Kansas, do hereby certify that the within and foregoing is the original case made as duly allowed and signed by the judge of said court this 13th day of August, A. D. 1884, and as such duly attested the same.

Given under my hand and official seal this 13th day of August, A. D. 1884.

[SEAL.] W. W. CHURCH,
Clerk of the District Court, Atchison County, State of Kan.,
By J. J. BOYD,
Deputy Clerk.

Filed by me this 14th day of August, A. D. 1884.

W. W. CHURCH,
Clerk District Court, Atchison County, State of Kansas,
By J. J. BOYD,
Deputy Clerk.

124 And afterwards, to wit, on the 7th day of March, A. D. 1885, the same being one of the regular judicial days of the January term, A. D. 1885, of the supreme court of the State of Kansas, before said court in session at the supreme court room in the city of Topeka—present, Hon. Albert H. Horton, chief justice; Hon. Daniel M. Valentine, associate justice, and Hon. William A. Johnston, associate justice, and C. J. Brown, clerk of said court—the following proceedings, among others, were had and entered of record as follows, to wit:

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff,

vs.

PATRICK MACKEY, Defendant.

This cause came on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed, with costs, and hereof let execution issue.

Johnston, J., delivered the opinion of the court, Horton, C. J., and Valentine, J., specially concurring.

And also on, to wit, the 7th day of March, A. D. 1885, the same being one of the regular judicial days of the January term, A. D. 1885, of the supreme court of the State of Kansas, there was filed in the office of the clerk of said court the syllabus and opinion of the court in said cause, a copy of which is in words and figures as follows, to wit:

125 *Syllabus.*

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
PATRICK MACKEY. } No. 3416.

Error from Atchison county affirmed.

By the Court, JOHNSTON, *J.*:

1. Chapter 93 of the Laws of 1874, which provides that railroad companies shall be liable for all damages to any of its employes caused by the negligence of co-employes, does not deny to railroad companies the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States and is not in conflict therewith. Mo. Pac. R'l'y Co. *v.* Haley, 25 Kas., 35; Buckley *v.* Central Iowa R'l'y Co., 18 C. of Iowa, 21 N. W. Rep., 103.
2. The inquiry of what are the general duties of a fireman on a switch engine in a certain track yard at a stated time does not relate to a matter which is the subject of expert testimony, and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof.
3. While witnesses ought not to be permitted to express an opinion that a fireman upon an engine performed a certain service in the manner required of him in the proper discharge of his duty, yet it is competent for any witness having personal knowledge of the facts to state what the duty is, or what services were generally performed by firemen in that yard.
4. In an action against a railroad company by one of its employes to recover for personal injury occasioned by the negligence of co-employes the plaintiff is held only to the exercise of ordi-
126 nary care to entitle him to recover—such care as men of ordinary judgment, intelligence, and prudence would exercise under like circumstances—and an instruction that any negligence or slight negligence on the part of the plaintiff would prevent a recovery would imply and hold the plaintiff to a higher degree of care than is by the law required of him, and was properly refused.
5. Evidence considered and held to be sufficient to show that plaintiff's injury was caused by the negligence of his co-employes, and also to sustain the finding of the jury that plaintiff was in the exercise of ordinary care at the time he received his injury.
6. An employe of a railroad company, thirty-nine years of age, in good health, who was serving in the capacity of fireman on a locomotive, had his leg and foot crushed, making amputation necessary and causing great and protracted suffering, impairing his general health, and after a lapse of more than two years the injury occasions him considerable nervous irritation and pain, which will probably increase and continue during his lifetime, is by the jury awarded damages in the amount of $12,000.00. Held, that under the circumstances the verdict is not so excess-

ive as to lead to a conclusion that the jury were actuated by passion, prejudice, or improper influence, nor to justify this court in setting the verdict aside.

Horton, C. J., specially concurring.
Valentine, J., specially concurring.

A true copy.

[Seal Supreme Court, State of Kansas.]

Attest: C. J. BROWN,
Clerk Supreme Court.

127 THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
PATRICK MACKEY. } No. 3416.

Error from Atchison county affirmed.

The opinion of the court was delivered by JOHNSTON, *J.*

This action was brought by Patrick Mackey against the Missouri Pacific Railway Company to recover for personal injuries sustained by him while employed by the defendant company as fireman upon a switch engine, and which injuries he alleges were occasioned solely by the gross carelessness and negligence of the employees of the railway company other than himself.

Among the facts, about which there is little if any dispute, may be stated the following: The railway company has control of two track yards in and adjacent to the city of Atchison, commonly designated as the "upper yard" and the "lower yard," and which are about one mile apart. On February 11th, 1882, the defendant company was using and operating two switch engines with their crews in these yards in running and switching cars, the engine designated as number 166 being chiefly used in the upper yard, and the other, known as number 154, being principally used in the lower yards, although each engine also hauled and pushed cars from one yard to the other, and both engines and their crews were used in the common employment of the defendant; that plaintiff was serving as fireman on engine number 166.

On the day the accident occurred number 154 started from the lower yard with from ten to fifteen loaded cars, for the pur-
128 pose of placing them upon the side tracks in the upper yard, where engine number 166 was at the same time employed in transferring cars from one point to another in the upper yard. About the time that number 154, going westward, entered the upper yard engine number 166 was backing eastward, when the two engines collided, wrecking the engines and crushing plaintiff's foot and leg, so that it became necessary to amputate it, which was done on that day. The collision occurred on a bright, clear day, between eleven and twelve o'clock in the forenoon. The ground was level, and the track was straight for a distance of about a quarter of a mile east of the point of collision, and the engineer in charge of engine number 154 could have seen engine number 166 that distance, and

he testifies that he did see engine number 166 at work in the upper yard while he was approaching and when he was a thousand feet away, but he did not ring the bell, sound the whistle, or give any signal or warning of the approach of his engine until he was within a few feet of engine number 166, and only three or four seconds before his engine collided with the other. No danger signal or other warning was given of the approach of number 154 by the engineer in control of number 166. Number 166, headed westward, had just pushed some cars west on the side track, and returning backed down upon the main track a distance of four or five hundred feet to the point of collision. When 166 started to back down the plaintiff tapped the bell several times, looking west in the meantime for signals from one of the crew, when he got down and began to break and shovel coal into the engine. While thus engaged he was bent over with his back toward the east, and just as he completed this work and straightened up for the purpose of taking his seat the collision occurred.

The case has been tried twice in the district court of Atchison county. At the first trial a verdict was rendered awarding the plaintiff $11,000 in damages. This verdict was by the court
129 set aside for error in the admission of testimony; and upon a second trial, occurring nearly a year afterwards, a verdict was rendered in favor of the plaintiff for the sum of $12,000. Numerous errors are assigned and discussed by counsel for defendant, which we will consider.

1. It is first urged that if the plaintiff can recover at all it must be under and by virtue of an act of the Legislature, approved February 26, 1874, which provides that "every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employés to any person sustaining such damage; that under this statute a liability is attempted to be created against a railroad company where none existed at common law, and that it subjects railroad corporations to liabilities and penalties not imposed upon other corporations and persons under like circumstances. It is argued with great earnestness and ability that railroad corporations are therefore by this statute denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the statute should be held invalid.

That question was presented to this court in the case of Mo. Pac. R'l'y Co. *v.* Haley, 25 Kas., 35. In that case it was decided, after full argument and a careful investigation of the question, that the statute was not in conflict with the Fourteenth Amendment to the Constitution of the United States. Upon a re-examination of the question we are satisfied that it was correctly decided, but we think it would be profitless to again review the authorities or enter upon a further discussion of the subject. We must regard this ruling as the settled law of the State unless it shall be declared to be erroneous by the Supreme Court of the United States. We might add that in Iowa a similar statute exists. Very recently its valid-

130 ity was challenged upon the same grounds as are urged here.

The supreme court of that State upheld the statute, and in deciding the case said:

"The argument, briefly stated, is that, under the statute, railroad corporations are subjected to penalties and liabilities which other persons and corporations engaged in like business are not subjected to; that the business of operating a railway is peculiarly hazardous to employees engaged in the operation of the road must be admitted. Counsel have not called our attention to any business which is equally hazardous, and as the statute is applicable to all corporations or persons engaged in operating railroads, it seems to us it does not discriminate in favor of or against any one. We think it it a pure question of legislative discretion whether the same penalties or liabilities should be applied to carriers by canal and stage-coach or to persons and corporations using steam in manufactories, as is prescribed by statute in relation to railroad companies. The provisions of section 30 of article 3 of the constitution of this State to the Fourteenth Amendment to the Constitution of the United State are quite similar, if not in spirit identical, in so far as either can be said to prohibit the Legislature from conferring exclusive privileges on any person, or imposing penalties upon any corporation which are not shared by others under like circumstances; and it was held in McAunich *v.* M. & M. R. Co., 20 Ia., 338, that the statute under consideration did not conflict with the constitution of this State, and for like reasons we do not think it conflicts with the Constitution of the United States."

Bucklew *v.* Cent. Ia. R'l'y Co., 21 N. W. Rep., p. 103.

2. A witness named JOHN STEELE was produced in behalf of plaintiff, who, in response to questions, gave the following testimony:

"Question. What business were you engaged in on the 11th of Feb., 1882?

Answer. Running an engine on the Central Branch.

Question. How long had you been running an engine there?

Answer. About two years.

Question. Had you any experience as a fireman before that time?

Answer. Between three and four years.

Question. Had any experience as a fireman on a switch engine at Atchison, Kansas, before that time?

Answer. Yes, sir; fired a switch engine here in the yard for six months.

Question. What was the general duty of a fireman on a switch engine while the engine is being moved from one point to another in the yard at that time?"

The defendant objected to the question last asked, stating, as a ground of his objection that it called for the opinion of the witness without any proper foundation having been laid to ask the question; and, further, that it was not a proper subject of expert testimony.

131 While we are inclined to agree with the counsel in their claim that the inquiry did not relate to that which was a subject of expert testimony, we still think it was unobjectionable, and that the witness was competent to answer the same. It was not a question involving special skill or scientific knowledge. What the general duties of a fireman in the Atchison yards were, or what is equivalent thereto, what duties were generally performed by firemen in the yards at that time, was a question of fact, within the common observation of a great many people, and, as stated by Chief Justice Horton, in Monroe *v.* Lappin, 25 Kans., 354, "It is a familiar rule that witnesses must speak to facts, and that they are not allowed to give opinions unless they are experts, and then only upon questions of science and skill."

The facts here inquired of are such that any one having personal knowledge thereof is competent to testify to the same, no matter how such intelligence may have been gained. But it will be observed that the witness Steele assumed to speak from personal knowledge. The preliminary testimony given by him shows that his opportunity for learning the facts was ample. He was engaged as an engineer in the service of the defendant at the time Mackey was injured; had been running an engine for two years; had had experience as fireman between three and four years, and had actually served as a fireman on a switch engine at Atchison, Kansas, and in the yard where the plaintiff was injured. Possibly the master mechanic, yard-master, or the person who had the direction and control of the firemen on these switch engines might, by reason of their position and experience, have had more exact information upon the subject than this witness, yet the testimony of common observers upon such subjects is admissible, so far as such observation goes. Commonwealth *v.* Dorsey, 103 Mass., 420; Funston *v.* C. R. I. & P. R. Co., 61 Ia., 452.

132 Whether he was acquainted with the facts, or whether he stated them correctly, could have bee inquired into by defendant and tested upon cross-examination. The answer he gave was: "The duty of a fireman on an engine is to keep the engine hot, to keep steam on, and to assist the engineer in watching for signals."

It is claimed by counsel that this testimony was, in effect, an opinion of the witness that the plaintiff was in the exercise of ordinary care at the time that the accident occurred. Not so. There was obviously no purpose to get from the witness his judgment or an opinion in regard to the manner in which plaintiff had performed this work, or whether he was properly discharging his duty at the time of his injury, nor did the testimony given by him go to that extent. The inquiry went only to the work generally performed by a fireman on an engine in those yards at that time. These facts might be testified to by any one having personal knowledge of the same, and these, together with many others that were shown concerning the action of the plaintiff at the time of the accident, were proper and necessary to enable the jury to reach an

opinion upon one of the leading issues in the case—whether there was contributory negligence on the part of the plaintiff.

In Allen *v.* Railroad Co., 57 Ia., 626, which was referred to by counsel in support of their objection, the court decided that while a witness ought not to be permitted to express an opinion that a particular manner of performing the services required of a brakeman in the discharge of his duty, yet it was competent for the witness to state as a fact what services were performed by the brakeman in the discharge of his duty. It may be added that testimony of a like character was offered on the part of the railway company, and all the testimony given in behalf of either party upon this subject agrees substantially with that given by the witness Steele.

133 We think there was no error in admitting this testimony, and what is said respecting its admissibility is applicable to other testimony of a like character objected to by defendant.

3. Objection is made by the defendant to the ruling of the court in restricting the cross-examination of the plaintiff. After he had testified in chief in relation to the work performed by him as fireman the defendant asked him the following question upon cross-examination, which was objected to and excluded: "Did you consider it the proper discharge of your duty at that time for each of you to be looking west, and that train going east as fast as a man could walk?"

Under the latitude which is usually allowed in the cross-examination of a plaintiff we think the question might have been allowed without doing any injustice to the plaintiff. However, it was not strictly pertinent or material to the issue in the case. What he considered to be his duty was unimportant. The question was, what were his duties and was he in the proper performance of the same at the time and immediately prior to the collision. There was no error in its exclusion.

4. Complaint is made of the refusal of the court to give certain instructions which were requested by the defendant on the trial of the case. A number of them related to the law of contributory negligence and its application to the facts of this case. Counsel for defendant say that while the court in its general charge to the jury instructed them that contributory negligence on the part of the plaintiff would bar a recovery, yet it failed to instruct what degree of negligence would defeat the action. If the charge of the court had been given as stated, without explanation or qualification, it would appear that the plaintiff had cause of complaint rather than the defendant. It is only ordinary care that the plaintiff was

134 bound to exercise, such care as men of ordinary judgment, intelligence, and prudence would exercise under like circumstances. Slight negligence on his part is not enough to defeat a recovery, providing the negligence of his fellow-servant is established, and the term contributory negligence is broad and inclusive enough to embrace the slightest negligence. But the court in the instructions which it gave did not stop with the mere statement that contributory negligence would bar a recovery. The jury was told that it was not enough that the injuries were received by reason of the

negligence of the fellow-servants of plaintiff; that the plaintiff could not recover unless it also appeared by a preponderance of the testimony that the plaintiff was in the exercise of ordinary care, such care and diligence as men in general exercise in respect to their own concerns under like circumstances. The court went father, and in defining contributory negligence and the duties of the plaintiff, directed the jury as follows:

"The plaintiff in accepting employment as a fireman upon one of the defendant's yard engines, assumed the ordinary hazards of that occupation. It was his duty to take ordinary care to avoid danger to himself, and he had a right to assume that his fellow-servants engaged in the management and operation of said two engines and their respective trains would exercise ordinary care toward him; but he had no right to assume that they would exercise extraordinary care, or the highest degree of diligence to avoid injury to him."

"And if the jury find from the evidence that under the circumstances it was the duty of the plaintiff to look out for obstructions in the direction that his engine was running, and that if he had been in the exercise of ordinary care he would have seen engine No. 154 in time to have avoided the collision, but that he negligently omitted to keep a proper look out, and his injury was the result of said negligence on his part, or the result of said negligence on his part together with the negligence of his fellow-servants, then the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant."

Other of the instructions asked were to the effect that any negligence on the part of the plaintiff would prevent a recovery. These would imply and hold the plaintiff to a higher degree of care than is by the law required of him. He was not bound to exercise extraordinary care and prudence, and the instructions were properly refused.

135 Some other exceptions are taken by the defendant to the ruling of the court, both upon the instructions refused and given, but in view of the decisions heretofore made by this court we think it is needless to discuss them. It is enough to say that we have examined them carefully, and that every rule of law proper and necessary to be stated to the jury embraced in those that were requested were included in the instructions given to the jury, and that the charge of the court in its entirety stated the law applicable to the case fully and clearly.

5. The defendant assigns as error the refusal of the court to submit a few special questions of fact. We have examined them and find no error in the refusal. There were one hundred and thirty-nine special questions submitted to the jury, embracing almost every material fact in the case. Some of those that were requested were modified so as to make them harmonize with others allowed. A part of them had been submitted in different form, and the remainder of the questions refused do not appear to have been material.

6. It is next urged that the court erred in overruling the motion for a new trial; that the testimony is not sufficient to show that the

co-employes of the defendant were culpably negligent, and that it does show that the plaintiff was at fault, and that his negligence contributed to the injury.

The findings of fact returned by the jury all consistently show that the co-employes of plaintiff could, by the exercise of ordinary care, have avoided the collision, and the further finding is made that the plaintiff was performing his duty and in the use of ordinary care when the accident occurred. We have read the testimony and reached the conclusion that it abundantly sustains the finding that the engineer in charge of engine number 154 was culpably negligent in the management of his engine. He saw the other engine at work in
136 the upper yard long before reaching it, but he came on at a speed of from four to six miles an hour, the other engine being all the time in plain view, and yet he never gave any signal or warning of his approach, nor did he make any effort to stop his engine until he was within a few feet of the other engine, and only two or three seconds of time elapsed between the sounding of the danger signal and the collision. There is no doubt from the evidence that he could have stopped his engine after the danger of collision became apparent to him. Whether the engineer in charge of engine number 166 noticed the approach from the east of engine number 154 does not appear. His engine had been running backward and forward in the upper yard switching cars, and shortly before 154 came into the yard it had been pushing cars in the opposite direction from which engine number 154 was coming. He then backed his engine east at the rate of from four to six miles an hour a distance of about five hundred feet to the point of collision. Some reason may be found for his failure to observe the approach of engine number 154, though in backing that distance and at that rate in a track yard where other engineers were employed ordinary care and prudence would seem to require that he should have looked for obstructions in the direction in which he was moving. It was strongly urged that it was equally the duty of plaintiff to keep a lookout for obstructions, and if he had done so the accident might have been avoided.

The evidence in the record tends to show that the engineer has direct control of the engine and that the fireman is under his direction as well; that the primary duty of plaintiff as fireman on a switch engine in that yard, as indicated by the name of the employment, was to fire the engine and to keep steam on, and when not thus engaged to assist the engineer to keep a lookout for
137 signals from the crew and for obstruction on the track. It also tends to show that just before the accident occurred, and when engine number 166 started to back east, the plaintiff was looking west, from which point he had been receiving signals from one of the crew, and, after tapping the bell a few times, stepped down from his seat and began to break and shovel coal into the engine, and that while he was thus engaged he was stooped over and facing west, and could not have seen the approach of engine number 154 except by straightening up and turning around. It is said that if he had looked in the direction they were moving before he began to fire the engine he would have observed number 154 coming, and

failing to do so he was at fault. This is not necessarily so. Engine number 154 was then about eight hundred feet away, and switch engines were frequently passing and repassing in the yard and there was still ample time in which to stop the engines. Besides the plaintiff had a right to presume that the engineers in charge of their respective engines would act with prudence and would exercise reasonable care in the management of their engines. In the language of Chief Justice Horton in Moulton *v* Aldrich, 28 Kas., 300: "Negligence is not attributable to a person when under the surrounding circumstances he has no reason to suspect any." It is not claimed that the plaintiff was needlessly engaged in firing the engine, and the jury find that he was in the performance of his duty and in the exercise of ordinary care at the time his injury was received. In the face of this finding, based on the testimony recited, we cannot say that the plaintiff was guilty of negligence which contributed to his injury.

It is finally urged that the judgment should be reversed because the damages awarded to the plaintiff by the jury are excessive. We are free to state that the award made by the jury was exceedingly liberal and perhaps too great, but under the circumstances of
138 the case we cannot say that the amount is so disproportionate to the injury as to show that it was given as a result of passion or prejudice, or by reason of any improper influences having been exercised upon the jury.

The plaintiff was thirty-nine years of age at the time of the injury, with an able body and good health. His lower leg and foot was badly crushed and was amputated about twelve inches below the knee; his suffering was great and protracted, so that he was confined to his bed for about two months, and he has been under medical treatment more or less ever since that time. It is stated by one of the physicians who testified in the case that as an effect of the amputation he has what is called degeneration of the nerves of the stump, and that he will probably suffer more or less pain from it during his lifetime; that it will affect his nerves, disturb his sleep, and impair his general health, with a likelihood that the affliction will increase with time. Another physician who testified stated that plaintiff has not since the amputation been as strong as formerly; that he suffers pain; that the stump is unduly sensitive on account of the inflammatory action of the nerve, causing the surrounding muscles to be very sensitive, and as a result there is a constant irritation of the nerves; that this irritation and suffering will continue, at least until another amputation is made; that in the present condition of his stump he cannot wear a cork leg, nor will he ever be able to wear one without undergoing a secondary amputation, which would be attended with danger and with the risk that the same condition of the stump might exist afterwards.

On all these considerations the jury awarded the plaintiff twelve thousand dollars. A former jury allowed eleven thousand dollars. Considering these facts, together with other circumstances that need not be mentioned, we cannot say that the award was so excessive as to lead to the conclusion that the jury was actuated by pas-

139 sion, prejudice, or corruption. The verdict was approved by the learned court that presided at the trial, and we do not feel that we would be justified in setting it aside.

The judgment of the court below must be affirmed.

140 VALENTINE, *J.*:

I differ to some extent from my brethren, and radically from the chief justice, as to what constitutes knowledge of a primary character as contradistinguished from mere opinion, inference, or conclusion, and the decision in this case illustrates such difference.

The court below, over the objections of the defendant, permitted John Steele, a witness for the plaintiff, to answer the following questions, to wit:

"1. What was the general duty of a fireman on a switch engine while the engine is being moved from one point to another in the yard at that time?

"2. Suppose at a given time the fireman is feeding his engine, is it his duty then to look out?

"3. State, in the order in which they come, what the general duties of a fireman on a switch engine was on the 11th day of February, A. D. 1882, when moving from one point to another in the yard."

And the court below also, on the cross-examination of the plaintiff, who was a witness in his own behalf and who had previously testified that he was a fireman on a railroad engine of the defendant and had testified with regard to his duties as such fireman, sustained an objection of the plaintiff to the following question asked by the defendant, to wit:

"Did you consider it the proper discharge of your duty at the time for each of you to be looking west and that train coming east as fast as a man could walk?"

A majority of this court sustains all these rulings of the court below upon the theory that the views or beliefs entertained
141 by a person as to what constitutes the duties of a fireman on a railroad engine are, when derived from personal observation, not merely matters of opinion or inference, but is knowledge of a primary character. In this I differ from my brethren. I believe that all mental conceptions or operations are merely opinions, inferences, or conclusions, except the direct and immediate cognitions of the person's own primary senses. And it is clear to my mind that no person can either see, hear, feel, taste, or smell a duty. His conception of duty when derived from personal observation is merely the result of inference, comparison, reasoning.

One of the questions which was to be proved on the trial of this case was whether it was the duty of the plaintiff while he, as fireman, and the engineer were operating a switch engine in the engine-yard of the defendant to look out for dangers or not. The defendant claims that such was his duty, and that if he had so looked out no injury would have occurred; while the plaintiff claims, first,

that it was not his duty to so look out; and, second, that if such was his duty, still "that in the order in which they (the duties) came" this duty was the last to be performed, and was to be performed only when he had nothing else to do, and that in the present case when the injury occurred he was already engaged in the performance of another and paramount duty. All the foregoing questions were asked for the purpose of showing what was or was not the duty of the plaintiff in this respect. All the questions asked of the witness Steele are approved by a majority of this court, because, as a majority of this court holds, they were put to him in such a manner as to obtain evidence which is not opinion, or inference, or conclusion, but is evidence of a higher character. Also, it is held by a majority of this court that the question put to the plaintiff
142 himself on cross-examination might be excluded without error, because it was put to him, not to obtain his knowledge, but merely to elicit an opinion from him, or, in other words, to obtain what he considered to be his duty. In all these matters the majority of this court treats the mental conception of what is or is not a duty, when such conception is derived from personal observation, as original and primary knowledge, and not as opinion, or inference, or conclusion. Hence the approval of the questions asked the witness Steele and the disapproval of the question asked the plaintiff on cross-examination.

In my opinion the mental conception of what are or what are not the duties of a fireman, when the same is obtained from personal observation and experience, is merely the opinion of the person who entertains such conception. One cannot see a duty, nor hear it, nor feel it, nor taste it, nor smell it, nor can he have any conception of it except by inference, comparison, — reasoning. His first observation of the work of a fireman might lead him to think one way, a second another, and so on indefinitely. His first observation might lead him to think that it was the duty of the fireman to look out for danger in a case like this; a second might lead him to think otherwise; a third might lead him to modify both of his former opinions, and a fourth might lead him to still further modify, and so on indefinitely. His inference from his first observation would, of course, be worth but little; but its value would be increased with every observation, and after many observations and a varied and extended experience the inference would become exceedingly valuable. The mental process leading to such inference would be in such a case a vast induction. Of course if the mental conception of duty is primary knowledge, there is no necessity for laying any foundation for the introduction of evidence to prove such duty; for a person may always testify with respect to his primary knowledge—that is,
143 with respect to what he has seen, heard, &c.—without any preliminary proof being offered, and he may testify with regard to what he has seen, heard, &c., although he may not have seen or heard the same more than once. Could he testify as to what the duties of a fireman on a railroad engine are or are not if he had never seen an engine operated more than once?

Some of the duties of firemen on railroad engines may come within

the common knowledge of people in general, and if they do the courts may then take judicial notice of them without proof. Others, undoubtedly, are matters of experience and skill, and come within the knowledge of a class of persons only, usually called experts, and can be testified to only by such class. And others still may not be matters of judicial knowledge at all, nor the subjects of expert testimony at all, but can be proved only by proof of the detailed facts which tend to show what they are. And then it is the duty of the jury to determine what the duties are. There are cases where ordinary witnesses may testify to opinions, but it is not necessary now to mention them.

My opinion on these subjects is more explicitly stated in the case of the City of Parsons *v.* Lindsay, 26 Kas., 426, 432. My opinion is also shown in the case of Monroe *v.* Lattin, 25 Kas., 351.

I am inclined to think that a sufficient foundation was laid for the introduction of Steele's testimony provided a foundation would render it competent, and I also think that the question asked the plaintiff on cross-examination included an assumption of the existence of a fact not warranted by the previous evidence, and therefore with considerable doubt I shall concur in affirming the judgment of the court below.

144 HORTON, *C. J.:*

I concur in the judgment in the foregoing case, but deem it important to add a few words to what has already been stated by the other members of the court.

As to the affirmance of the judgment below, it is immaterial, in my opinion, whether the answers given by Steele to the questions propounded him were matters of opinion or of personal knowledge.

If the questions put to him were for the purpose of obtaining his opinion only, then he was competent as an expert to testify. The evidence shows that he was engaged as an engineer in the service of the railroad company at the time the plaintiff was injured; that before the injury he had worked three or four years as a fireman and had actually worked as a fireman for several months on a switch engine in the yard of the railroad company at Atchison and in the identical yard where the plaintiff was injured. Therefore, Steele, strictly speaking, was one who, by practice and observation, had become experienced in the duties of a firman.

But I do not think that the questions put to Steele were intended to obtain merely his opinion of the matters inquired of, but were intended to elicit from him facts of which he had personal knowledge *thereof.* Therefore, the question arises whether a witness who has actual knowledge may testify what the general duties of a servant or employe are.

Worcester, among his other definitions, defines duty as follows: "Any service, business, or office." A like definition is given in the Imperial Dictionary, vol. 2, 114.

When we speak of duty as applied to a servant or emyloye, the matter involves his service or business. We intend to refer to what he does in his service or business. When we ask a servant what his

general duties are we intend to ask him what services or work he generally performs. If I advertise for a servant to attend to
145 my room, and the applicant, in answer thereto, calls upon me and asks "What his general duties are to be," he does not intend for me to guess or merely give an opinion, but he does seek, by the inquiry, information as to what services he is expected to perform, and when I say to him that "His general duties will be to build my fires and sweep my room" I do not intend thereby to merely guess or give an opinion; I intend to inform him that if he enters my service it is expected of him as a duty or service to build my fires and sweep my room. After he does enter my service if some one inquires of him "What his general duties are," and he answers, "They are to build my fires and sweep my room," I do not think that such servant in making such an answer merely guesses or gives his opinion. I think he testifies to matters within his own personal knowledge. It is always competent for a witness to state what services are performed by him in any business or employment, and when we ask a witness to state his general duties in any service or employment the inquiry involves the general services performed by him in such employment. Therefore, I think that when Steele was called upon to testify as to the general duties of the plaintiff, of which he had actual knowledge, the inquiry was the same as what services were performed by him as fireman. This and nothing more.

My conclusion is that where the general duties or general services or a servant or employe are not prescribed by written orders or rules that any witness having actual knowledge of such general duties or services may testify as to what they are of his own personal knowledge.

I do not think there is anything in these views conflicting with the case of Monroe *vs.* Latin, 25 Kas., 351, or with City of Parsons *vs.* Lindsay, 26 Kas., 426. In the case of Monroe *vs.* Latin, *supra*, the question was asked: "Then you would not think it neg-
146 ligent, would you, to leave him (the horse) unhitched just long enough for you to get into the buggy, if the lines are upon the same side of the horse, you are going to get in?" The answer was, "I would not consider it negligent." All of this was excluded. Of course, this question called solely for an opinion and the matter did not involve skill or science. In that case the witness did not claim to be an expert, nor can it be in any manner urged that the evidence was upon matters within his own personal knowledge. In the City of Parsons *vs.* Lindsay, *supra*, the court permitted one of the parties, over the objection of the other, to introduce in evidence the opinions of several witnesses that the street-crossing was unsafe and dangerous. No attempt was made to show that the witnesses were experts. I therefore think in that case that the question at issue before the jury, whether the street-crossing was safe or not, should have been left to the jury to be determined under a statement of all the facts and circumstances within the knowledge of the witnesses as to the condition of the crossing. If Steele had been asked to give his opinion whether the plaintiff was negligent at the time

he received his injury, the inquiry would have been of the character declared incompetent in Monroe *vs.* Lattin, *supra*. If Steele had been asked to give his opinion whether the plaintiff was acting in an unsafe and dangerous manner at the time he received his injury, such inquiry would also have been incompetent within City of Parsons *vs.* Lindsay, *supra*.

In the dissenting opinion the following question put to plaintiff is referred to and commented upon: "Did you consider it the proper discharge of your duty at the time for each of you to be look-
147 ing west and that train going east as fast as a man could walk?"

I think that this question was properly excluded, because it seems to me it was asked solely to confuse and mislead the jury.

I do not understand that there is any evidence in the record tending to show that at the time of the injury complained of the fireman and engineer were both looking west. The assumption of fact in the question was wholly unsustained by any evidence before the jury, and therefore the question itself was improper.

A true copy.

[Seal Supreme Court, State of Kansas.]

Attest: C. J. BROUEN,
Clerk Supreme Court.

148 And thereafter, on March 17, A. D. 1885, there was filed with the clerk of said court the following bill of exceptions allowed by the chief justice of the supreme court, to wit:

149 *Bill of Exceptions.*

In the Supreme Court of the State of Kansas.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
PATRICK MACKEY, Defendant in Error.

Be it remembered that on the 30th day of August, A. D. 1884, the said The Missouri Pacific Railway Company duly filed its petition in error in the above-entitled court, praying for a reversal of a judgment and decree of the district court at Atchison county, State of Kansas, in a certain action wherein Patrick Mackey was plaintiff, and the said The Missouri Pacific Railway Company was defendant, in which said action the said Patrick Mackey, by consideration and judgment of said district court, recovered judgment against the said Missouri Pacific Railway Company for the sum of twelve thousand dollars and costs of suit; that among other reasons claimed and presented for a reversal of such judgment by the said Missouri Pacific Railway Company it was alleged and contended that the act of the Legislature of the State of Kansas, entitled "An act to define the liability of railroad companies in certain cases," and which said act reads as follows:

"Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Every railroad company organized or doing business in

this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage.

SECTION 2. This act shall take effect from its publication once in the Kansas Farmer.

Approved February 26, 1874."

Is in conflict with section one, article fourteen, of the Constitution of the United States, and especially that portion of said sec-
150 tion 1 of said article 14 which reads as follows, to wit:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," which said point and reason for a reversal of said judgment of the district court of Atchison county, Kansas, was fully presented to the said supreme court of the State of Kansas, and on which presentation the said supreme court of the State of Kansas held and decided that said act of the Legislature of the State of Kansas, entitled "An act to define the liability of railroad companies in certain cases," was not in conflict with section 1, article 14, of the Constitution of the United States, and said supreme court held that such reason was not sufficient to reverse said judgment and decree of said district court of Atchison county, State of Kansas, and on March 7, 1885, duly filed the following opinions of the judges of said court affirming such judgment, to wit:

151 *Syllabus.*

THE MISSOURI PACIFIC RAILWAY COMPANY *vs.* PATRICK MACKEY. } No. 3416.

Error from Atchison county affirmed.

By the court, JOHNSTON, *J.:*

1. Chapter 93 of the laws of 1874, which provides that railroad companies shall be liable for all damages to any of its employes caused by the negligence of co-employes, does not deny to railroad companies the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is not in conflict therewith. Mo. Pac. R'l'y Co. *v.* Haley, 25 Kas., 35; Bucklew *v.* Central Iowa R'l'y Co., S. C. of Iowa, 21 N. W. Rep., 103.
2. The inquiry of what are the general duties of a fireman on a switch engine in a certain track yard at a stated time does not relate to a matter which is the subject of expert testimony, and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof.

3. While witnesses ought not to be permitted to express an opinion that a fireman upon an engine performed a certain service in the manner required of him in the proper discharge of his duty, yet it is competent for any witness having personal knowledge of the facts to state what the duty is, or what services were generally performed by firemen in that yard.

4. In an action against a railroad company by one of its employes to recover for personal injury occasioned by the negligence of co-employes the plaintiff is held only to the exercise of ordinary care to entitle him to recover—such care as men of
152 ordinary judgment, intelligence, and prudence would exercise under like circumstances—and an instruction that any negligence or slight negligence on the part of the plaintiff would prevent a recovery would imply and hold the plaintiff to a higher degree of care than is by the law required of him, and was properly refused.

5. Evidence considered and held to be sufficient to show that plaintiff's injury was caused by the negligence of his co-employes, and also to sustain the finding of the jury that plaintiff was in the exercise of ordinary care at the time he received his injury.

6. An employe of a railroad company thirty-nine years of age, in good health, who was serving in the capacity of fireman on a locomotive, had his leg and foot crushed, making amputation necessary, and causing great and protracted suffering, impairing his general health, and after a lapse of more than two years the injury occasions him considerable nervous irritation and pain, which will probably increase and continue during his lifetime, is by the jury awarded damages in the amount of $12,000.00. Held, that under the circumstances the verdict is not so excessive as to lead to a conclusion that the jury were actuated by passion, prejudice, or improper influences, nor to justify this court in setting the verdict aside.

Horton, C. J., specially concurring.
Valentine, J., specially concurring.

A true copy.

[Seal Supreme Court, State of Kansas.]

Attest: C. J. BROWN,
Clerk Supreme Court.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs.
PATRICK MACKEY. } No. 3416.

153 Error from Atchinson county affirmed.

The opinion of the court was delivered by JOHNSTON, *J.:*

This action was brought by Patrick Mackey against the Missouri Pacific Railway Company to recover for personal injuries sustained by him while employed by the defendant company as fireman upon

a switch engine, and which injuries he alleges were occasioned solely by the gross carelessness and negligence of the employes of the railway company, other than himself.

Among the facts, about which there is little, if any, dispute, may be stated the following: The railway company has control of two track yards in and adjacent to the city of Atchison, commonly designated as the "upper yard" and the "lower yard," and which are about one mile apart. On February 11th, 1882, the defendant company was using and operating two switch engines, with their crews, in these yards, in running and switching cars, the engine designated as number 166 being chiefly used in the upper yard, and the other, known as number 154, being principally used in the lower yard, although each engine also hauled and pushed cars from one yard to the other, and both engines and their crews were used in the common employment of the defendant; that plaintiff was serving as fireman on engine number 166.

On the day the accident occurred number 154 started from the lower yard with from ten to fifteen loaded cars for the purpose
154 of placing them upon the side tracks in the upper yard, where engine number 166 was at the same time employed in transferring cars from one point to another in the upper yard. About the time that number 154, going westward, entered the upper yard engine number 166 was backing eastward, when the two engines collided, wrecking the engines and crushing plaintiff's foot and leg so that it became necessary to amputate it, which was done on that day. The collision occurred on a bright clear day, between eleven and twelve o'clock in the forenoon. The ground was level and the track was straight for a distance of about a quarter of a mile east of the point of collision, and the engineer in charge of engine number 154 could have seen engine number 166 that distance, and he testifies that he did see engine number 166 at work in the upper yard while he was approaching and when he was a thousand feet away, but he did not ring the bell, sound the whistle, or give any signal or warning of the approach of his engine until he was within a few feet of engine number 166, and only three or four seconds before his engine collided with the other. No danger signal or other warning was given of the approach of number 154 by the engineer in control of number 166. Number 166 headed westward, had just pushed some cars west on the side track, and returning backed down upon the main track a distance of four or five hundred feet to the point of collision. When 166 started to back down the plaintiff tapped the bell several times, looking west in the meantime for signals from one of the crew, when he got down and began to break and shovel coal into the engine. While thus engaged he was bent over with his back toward the east, and just as he completed this work and straightened up for the purpose of taking his seat the collision occurred.

The case had been tried twice in the district court of Atchison county. At the first trial a verdict was rendered awarding the plaintiff $11,000 in damages. This verdict was by the court
155 set aside for error in the admission of testimony, and upon a

second trial, occurring nearly a year afterwards, a verdict was rendered in favor of the plaintiff for the sum of $12,000. Numerous errors are assigned and discussed by counsel for defendant, which we will consider.

1. It is first urged that if the plaintiff can recover at all it must be under and by virtue of an act of the Legislature approved February 26, 1874, which provides that "every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employes to any person sustaining such damage;" that under this statute a liability is attempted to be created against a railroad company where none existed at common law, and that it subjects railroad corporations to liabilities and penalties not imposed upon other corporations and persons under like circumstances. It is argued with great earnestness and ability that railroad corporations are therefore by this statute denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the statute should be held invalid.

That question was presented to this court in the case of Mo. Pac. R'l'y Co. *v.* Haley, 25 Kas., 35. In that case it was decided, after full argument and a careful investigation of the question, that the statute was not in conflict with the Fourteenth Amendment to the Constitution of the United States. Upon a re-examination of the question we are satisfied that it was correctly decided, but we think it would be profitless to again review the authorities or enter upon a further discussion of the subject. We must regard this ruling as the settled law of the State unless it shall be declared to be erroneous by the Supreme Court of the United States. We might add that in Iowa a similar statute exists. Very recently its validity was
156 challenged upon the same grounds as are urged here. The supreme court of that State upheld the statute, and in deciding the case said:

"The argument, briefly stated, is that, under the statute, railroad corporations are subjected to penalties and liabilities which other persons and corporations engaged in like business are not subjected to. That the business of operating a railway is peculiarly hazardous to employees engaged in the operation of the road must be admitted. Counsel have not called our attention to any business which is equally hazardous, and as the statute is applicable to all corporations or persons engaged in operating railroads, it seems to us it does not discriminate in favor of or against any one. We think it is a pure question of legislative discretion whether the same penalties or liabilities should be applied to carriers by canal and stage-coach, or to persons and corporations using steam in manufactories, as is prescribed by statute in relation to railroad companies. The provisions of section 30 of article 3 of the constitution of this State to the Fourteenth Amendment to the Constitution of the United States are quite similar, if not in spirit identical, in so far as either can be said to prohibit the Legislature from conferring exclusive privileges on any person or imposing penalties upon any corpora-

tion which are not shared by others under like circumstances; and it was held in McAunich *v.* M. & M. R. Co., 20 Ia., 338, that the statute under consideration did not conflict with the constitution of this State, and for like reasons we do not think it conflicts with the Constitution of the United States."

Bucklew *v.* Cent. Ia. R'l'y Co., 21 N. W. Rep., p. 103.

2. A witness named John Steele was produced in behalf of plaintiff, who, in response to questions, gave the following testimony:

"Question. What business were you engaged in on the 11th of Feb., 1882?

Answer. Running an engine on the Central Branch.

Question. How long had you been running an engine there?

Answer. About two years.

Question. Had you any experience as a fireman before that time?

Answer. Between three and four years.

Question. Had any experience as a fireman on a switch engine at Atchison, Kansas, before that time?

Answer. Yes, sir; fired a switch engine here in the yard for six months.

Question. What was the general duty of a fireman on a switch engine while the engine is being moved from one point to another in the yard at that time?"

The defendant objected to the question last asked, stating as a ground of his objection that it called for the opinion of the witness without any proper foundation having been laid to ask the question, and, further, that it was not a proper subject of expert testimony.

157 While we are inclined to agree with the counsel in their claim that the inquiry did not relate to that which was a subject of expert testimony, we still think that it was unobjectionable, and that the witness was competent to answer the same. It was not a question involving special skill or scientific knowledge. What the general duties of a fireman in the Atchison yards were, or, what is equivalent thereto, what duties were generally performed by firemen in the yards at that time, was a question of fact, within the common observation of a great many people, and, as stated by Chief Justice Horton in Monroe *v.* Lappin, 25 Kas., 354: "It is a familiar rule that witnesses must speak to facts, and that they are not allowed to give opinions unless they are experts, and then only upon questions of science and skill."

The facts here inquired of are such that any one having personal knowledge thereof is competent to testify to the same, no matter how such intelligence may have been gained. But it will be observed that the witness Steele assumed to speak from personal knowledge. The preliminary testimony given by him shows that his opportunity for learning the facts was ample. He was engaged as an engineer in the service of the defendant at the time Mackey was injured; had been running an engine for two years; had had experience as fireman between three and four years, and had actually served as a

fireman on a switch engine at Atchison, Kansas, and in the yard where the plaintiff was injured. Possibly the master mechanic, yard-master, or the person who had the direction and control of the firemen on these switch engines might, by reason of their position and experience, have had more exact information upon the subject than this witness, yet the testimony of common observers upon such subjects is admissible so far as such observation goes. Commonwealth *v.* Dorsey, 103 Mass., 420; Funston *v.* C. R. I. & P. R. Co., 60; 61 Ia., 452.

158 Whether he was acquainted with the facts or whether he stated them correctly could have been inquired into by defendant and tested upon cross-examination. The answer he gave was: "The duty of a fireman on an engine is to keep the engine hot, to keep steam on, and to assist the engineer in watching for signals."

It is claimed by counsel that this testimony was in effect an opinion of the witness that the plaintiff was in the exercise of ordinary care at the time that the accident occurred. Not so. There was obviously no purpose to get from the witness his judgment or an opinion in regard to the manner in which plaintiff had performed this work, or whether he was properly discharging his duty at the time of his injury, nor did the testimony given by him go to that extent. The inquiry went only to the work generally performed by a fireman on an engine in those yards at that time. These facts might be testified to by any one having personal knowledge of the same, and these, together with many others that were shown concerning the action of the plaintiff at the time of the accident, were proper and necessary to enable the jury to reach an opinion upon one of the leading issues in the case, whether there was contributory negligence on the part of the plaintiff.

In Allen *v.* Railroad Co., 57 Ia., 626, which was referred to by counsel in support of their objection, the court decided that while a witness ought not to be permitted to express an opinion *that* a particular manner of performing the services required of a brakeman in the discharge of his duty, yet it was competent for the witnesses to state as a fact what services were performed by the brakeman in the discharge of his duty. It may be added that testimony of a like character was offered on the part of the railway company, and all the testimony given in behalf of either party upon this subject agrees substantially with that given by the witness Steele.

159 We think there was no error in admitting this testimony, and what is said respecting its admissibility is applicable to other testimony of a like character objected to by the defendant.

3. Objection is made by the defendant to the ruling of the court in restricting the cross-examination of the plaintiff after he had testified in chief in relation to the work performed by him as fireman. The defendant asked him the following question upon cross-examination, which was objected to and excluded: "Did you consider it the proper discharge of your duty at that time for each of you to be looking west, and that train going east as fast as a man could walk?"

Under the latitude which is usually allowed in the cross-examination of a plaintiff, we think the question might have been allowed without doing any injustice to the plaintiff. However, it was not strictly pertinent or material to the issue in the case. What he considered to be his duty was unimportant. The question was, what were his duties, and was he in the proper performance of the same at the time and immediately prior to the collision? There was no error in its exclusion.

4. Complaint is made of the refusal of the court to give certain instructions which were requested by the defendant on the trial of the case. A number of them related to the law of contributory negligence and its application to the facts of this case. Counsel for defendant say that while the court in its general charge to the jury instructed them that contributory negligence on the part of the plaintiff would bar a recovery, yet it failed to instruct what degree of negligence would defeat the action. If the charge of the court had been given as stated, without explanation or qualification, it would appear that the plaintiff had cause of complaint rather than the defendant. It is only ordinary care that the plaintiff was bound to exercise, such care as men
160 of ordinary judgment, intelligence, and prudence would exercise under like circumstances. Slight negligence on his part is not enough to defeat a recovery, providing the negligence of his fellow-servant is established, and the term contributory negligence is broad and inclusive enough to embrace the slightest negligence. But the court in the instructions which it gave did not stop with the mere statement that contributory negligence would bar a recovery. The jury was told that it was not enough that the injuries were received by reason of the negligence of the fellow-servants of plaintiff; that the plaintiff could not recover unless it also appeared by a preponderance of the testimony that the plaintiff was in the exercise of ordinary care, such care and diligence as men in general exercise in respect to their own concerns under like circumstances. The court went farther, and in defining contributory negligence and the duties of the plaintiff directed the jury as follows:

"The plaintiff in accepting employment as a fireman upon one of the defendant's yard engines assumed the ordinary hazards of that occupation. It was his duty to take ordinary care to avoid danger to himself, and he had a right to assume that his fellow-servants engaged in the management and operation of said two engines and their respective trains would exercise ordinary care towards him. But he had no right to assume that they would exercise extraordinary care or the highest degree of diligence to avoid injury to him."

"And if the jury find from the evidence that under the circumstances it was the duty of the plaintiff to look out for obstructions in the direction that his engine was running, and that if he had been in the exercise of ordinary care he would have seen engine No. 154 in time to have avoided the collision; but that he negligently omitted to keep a proper look out, and his injury was the result of said negligence on his part, or the result of said negligence on his

part, together with the negligence of his fellow-servants, then the plaintiff is not entitled to recover, and your verdict should be in favor of the defendant."

Other of the instructions asked were to the effect that any negligence on the part of the plaintiff would prevent a recovery. These would imply and hold the plaintiff to a higher degree of care than is by the law required of him. He was not bound to exercise extraordinary care and prudence, and the instructions were properly refused.

161 Some other exceptions are taken by the defendant to the ruling of the court, both upon the instructions refused and given, but in view of the decisions heretofore made by this court we think it is needless to discuss them. It is enough to say that we have examined them carefully and that every rule of law proper and necessary to be stated to the jury embraced in those that were requested were included in the instructions given to the jury, and that the charge of the court in its entirety stated the law applicable to the case fully and clearly.

5. The defendant assigns as error the refusal of the court to submit a few special questions of fact. We have examined them and find no error in the refusal. There were one hundred and thirty-nine special questions submitted to the jury, embracing almost every material fact in the case. Some of those that were requested were modified so as to make them harmonize with others allowed. A part of them had been submitted in different form, and the remainder of the questions refused do not appear to have been material.

6. It is next urged that the court erred in overruling the motion for a new trial; that the testimony is not sufficient to show that the co-employés of the defendant were culpably negligent, and that it does show that the plaintiff was at fault and that his negligence contributed to the injury.

The findings of fact returned by the jury all consistently show that the co-employés of plaintiff could, by the exercise of ordinary care, have avoided the collision, and the further finding is made that the plaintiff was performing his duty and in the use of ordinary care when the accident occurred. We have read the testimony and have reached the conclusion that it abundantly sustains the finding that the engineer in charge of engine number 154 was culpably negligent in the management of his engine. He saw the other engine at work in the upper

162 yard long before reaching it, but he came on at a speed of from four to six miles an hour, the other engine being all the time in plain view, and yet he never gave any signal or warning of his approach, nor did he make any effort to stop his engine until he was within a few feet of the other engine, and only two or three seconds of time elapsed between the sounding of the danger signal and the collision. There is no doubt from the evidence that he could have stopped his engine after the danger of collision became apparent to him. Whether the engineer in charge of engine number 166 noticed the approach from the east of engine number 154 does not appear. His engine had been running backward and forward

in the upper yard switching cars, and shortly before 154 came into the yard it had been pushing cars in the opposite direction from which engine number 154 was coming. He then backed his engine east at the rate of from four to six miles an hour a distance of about five hundred feet to the point of collision. Some reason may be found for his failure to observe the approach of engine number 154, though in backing that distance, and at that rate in a track yard where other engines were employed, ordinary care and prudence would seem to require that he should have looked for obstructions in the direction in which he was moving. It is strongly urged that it was equally the duty of plaintiff to keep a lookout for obstructions, and if he had done so the accident might have been avoided.

The evidence in the record tends to show that the engineer has direct control of the engine, and that the fireman is under his direction as well; that the primary duty of plaintiff as fireman on a switch engine in that yard, as indicated by the name of the employment, was to fire the engine and to keep steam on, and when not thus engaged to assist the engineer to keep a lookout for sig-
163 nals from the crew and for obstructions on the track. It also tends to show that just before the accident occurred, and when engine number 166 started to back east, the plaintiff was looking west, from which point he had been receiving signals from one of the crew, and after tapping the bell a few times, stepped down from his seat and began to break and shovel coal into the engine, and that while he was thus engaged he was stooped over and facing west, and could not have seen the approach of engine number 154 except by straightening up and turning around. It is said that if he had looked in the direction they were moving before he began to fire the engine, he would have observed number 154 coming, and failing to do so, he was at fault. This is not necessarily so. Engine number 154 was then about eight hundred feet away, and switch engines were frequently passing and repassing in the yard, and there was still ample time in which to stop the engines. Besides, the plaintiff had a right to presume that the engineers in charge of their respective engines would act with prudence, and would exercise due care in the management of their engines. In the language of Chief Justice Horton in Moulton *v.* Aldrich, 28 Kas., 300, "Negligence is not attributable to a person when under the surrounding circumstances he has no reason to suspect any." It is not claimed that the plaintiff was needlessly engaged in firing the engine, and the jury find that he was in the performance of his duty and in the exercise of ordinary care at the time his injury was received. In the face of this finding, based on the testimony recited, we cannot say that the plaintiff was guilty of negligence which contributed to his injury.

It is finally urged that the judgment should be reversed because the damages awarded to the plaintiff by the jury are excessive. We are free to state that the award made by the jury was exceedingly liberal and perhaps too great, but under the circumstances of
164 the case we cannot say that the amount is so disproportionate to the injury as to show that it was given as a result of pas-

sion or prejudice, or by reason of any improper influences having been exercised upon the jury.

The plaintiff was thirty-nine years of age at the time of the injury, with an able body and good health. His lower leg and foot was badly crushed, and was amputated about twelve inches below the knee. His suffering was great and protracted, so that he was confined to his bed for about two months, and he has been under medical treatment more or less ever since that time. It is stated by one of the physicians who testified in the case that as an effect of the amputation he has what is called degeneration of the nerves of the stump, and that he will probably suffer more or less pain from it during his lifetime; that it will affect his nerves, disturb his sleep, and impair his general health, with a likelihood that the affliction will increase with time. Another physician who testified stated that plaintiff has not since the amputation been as strong as formerly; that he suffers pain; that the stump is unduly sensitive on account of the inflammatory action of the nerve, causing the surrounding muscles to be very sensitive, and, as a result, there is a constant irritation of the nerves; that this irritation and suffering will continue, at least until another amputation is made; that in the present condition of his stump he cannot wear a cork leg, nor will he ever be able to wear one without undergoing a secondary amputation, which would be attended with danger and with the risk that the same condition of the stump might exist afterwards.

On all these considerations the jury awarded the plaintiff twelve thousand dollars. A former jury allowed eleven thousand dollars. Considering these facts, together with other circumstance that need not be mentioned, we cannot say that the award was so excessive as to lead to the conclusion that the jury was actuated by pas-
165 sion, prejudice, or corruption. The verdict was approved by the learned court that presided at the trial, and we do not feel that we would be justified in setting it aside.

The judgment of the court below must be affirmed.

166 VALENTINE, *J.*:

I differ to some extent from my brethren, and radically from the chief justice, as to what constitutes knowledge of a primary character, as contradistinguished from mere opinion, inference, or conclusion, and the decision in this case illustrates such difference.

The court below, over the objections of the defendant, permitted John Steele, a witness for the plaintiff, to answer the following questions, to wit:

"1. What was the general duty of a fireman on a switch engine while the engine is being moved from one point to another in the yard at that time?

"2. Suppose at a given time the fireman is feeding his engine, is it his duty then to look out?

"3. State, in the order in which they come, what the general duties of a fireman on a switch engine was on the 11th day of February, A. D. 1882, when moving from one point to another in the yard."

And the court below also, on the cross-examination of the plaintiff, who was a witness in his own behalf and who had previously testified that he was a fireman on a railroad engine of the defendant and had testified with regard to his duties as such fireman, sustained an objection of the plaintiff to the following question asked by the defendant, to wit:

"Did you consider it the proper discharge of your duty at the time for each of you to be looking west and that train going east as fast as a man could walk?"

A majority of this court sustain all these rulings of the court below upon the theory that the views or beliefs entertained by a
167 person as to what constitutes the duties of a fireman on a railroad engine are, when derived from personal observation, not merely matters of opinion or inference, but is knowledge of a primary character. In this I differ from my brethren. I believe that all mental conceptions or operations are merely opinions, inferences, or conclusions, except the direct and immediate cognitions of the person's own primary senses; and it is clear to my mind that no person can either see, hear, feel, taste, or smell a duty; his conception of duty, when derived from personal observation, is merely the result of inference, comparison, reasoning.

One of the questions which was to be proved on the trial of this case was whether it was the duty of the plaintiff while he, as fireman, and the engineer were operating a switch engine in the engine yard of the defendant to look out for dangers or not. The defendant claims that such was his duty, and that if he had so looked out no injury would have occurred, while the plaintiff claims—first, that it was not his duty to so look out; and, second, that if such was his duty, still "that in the order in which they (the duties) came," this duty was the last to be performed, and was to be performed only when he had nothing else to do, and that in the present case, when the injury occurred, he was already engaged in the performance of another and paramount duty. All the foregoing questions were asked for the purpose of showing what was or was not the duty of the plaintiff in this respect. All the questions asked of the witness Steele are approved by a majority of this court, because, as a majority of this court hold, they were put to him in such a manner as to obtain evidence which is not opinion or inference or conclusion, but is evidence of a higher character; also it is held by a majority of this court that the question put to the plain-
168 tiff himself on cross-examination might be excluded without error, because it was put to him not to obtain his knowledge, but merely to elicit an opinion from him, or, in other words, to obtain what he considered to be his duty. In all these matters the majority of this court treat the mental conception of what is or is not a duty, when such conception is derived from personal observation, as original and primary knowledge, and not as opinion or inference or conclusion. Hence the approval of the questions asked the witness Steele and the disapproval of the question asked the plaintiff on cross-examination.

In my opinion, the mental conception of what are not the duties of a fireman when the same is obtained from personal observation and experience is merely the opinion of the person who entertains such conception. One cannot see a duty, nor hear it, nor feel it, nor taste it, nor smell it, nor can he have any conception of it except by inference, comparison, reasoning. His first observation of the work of a fireman might lead him to think one way, a second another, and so on indefinitely. His first observation might lead him to think that it was the duty of the fireman to look out for dangers in a case like this; a second might lead him to think otherwise; a third might lead him to modify both of his former opinions, and a fourth might lead him to still further modify, and so on indefinitely. His inference from his first observation would of course be worth but little, but its value would be increased with every observation, and after many observations and a varied and extended experience the inference would become exceedingly valuable. The mental process leading to such inference would be in such a case a vast induction. Of course, if the mental conception of duty is primary knowledge, there is no necessity for laying any foundation for the introduction of evidence to prove such duty, for a person may always testify with respect to his primary knowledge—that is, with
169 respect to what he has seen, heard, &c., without any preliminary proof being offered, and he may testify with regard to what he has seen, heard, &c., although he may not have seen or heard the same more than once. Could he testify as to what the duties of a fireman on a railroad engine are or are not if he had never seen an engine operated more than once?

Some of the duties of firemen on railroad engines may come within the common knowledge of people in general, and if they do the courts may then take judicial notice of them without proof. Others, undoubtedly, are matters of experience and skill, and come within the knowledge of a class of persons only, usually called experts, and can be testified to only by such class; and others still may not be matters of judicial knowledge at all, nor the subjects of expert testimony at all, but can be proved only by proof of the detailed facts which tend to show what they are, and then it is the duty of the jury to determine what the duties are. There are cases where ordinary witnesses may testify to opinions, but it is not necessary now to mention them.

My opinion on these subjects is more explicitly stated in the case of The City of Parsons *v.* Lindsay, 26 Kas., 426–432. My opinion is also shown in the case of Monroe *v.* Lattin, 25 Kas., 351.

I am inclined to think that a sufficient foundation was laid for the introduction of Steele's testimony, provided a foundation would render it competent; and I also think that the questions asked the plaintiff on cross-examination included an assumption of the existence of a fact not warranted by the previous evidence.

And therefore, with considerable doubt, I shall concur in affirming the judgment of the court below.

170 HORTON, *C. J.*:

I concur in the judgment in the foregoing case, but deem it important to add a few words to what has already been stated by the other members of the court.

As to the affirmance of the judgment below, it is immaterial, in my opinion, whether the answers given by Steele to the questions propounded him were matters of opinion or of personal knowledge. If the questions put to him were for the purpose of obtaining his opinion only, then he was competent as an expert to testify. The evidence shows that he was engaged as an engineer in the service of the railroad company at the time the plaintiff was injured; that before the injury he had worked three or four years as a fireman and had actually worked as a fireman for several months on a switch engine in the yard of the railroad company at Atchison and in the identical yard where the plaintiff was injured. Therefore, Steele, strictly speaking, was one who, by practice and observation, had become experienced in the duties of a fireman.

But I do not think that the questions put to Steele were intended to obtain merely his opinion of the matters inquired of, but were intended to elicit from him facts of which he had personal knowledge *thereof*. Therefore, the question arises whether a witness who has actual knowledge may testify what the general duties of a servant or employe are.

Worcester, among his other definitions, defines duty as follows: "Any service, business, or office." A like definition is given in the Imperial Dictionary, vol. 2, 114.

When we speak of duty as applied to a servant or employe, the matter involves his service or business. We intend to refer to what he does in his service or business. When we ask a servant what his general duties are we intend to ask him what services or work he gen-
erally performs. If I advertise for a servant to attend to my
171 room and the applicant, in answer thereto, calls upon me and asks "What his general duties are to be," he does not intend for me to guess or merely give an opinion, but he does seek, by the inquiry, information as to what services he is expected to perform, and when I say to him that "his general duties will be to build my fires and sweep my room," I do not intend thereby to merely guess or give an opinion; I intend to inform him that if he enters my service it is expected of him as a duty or service to build my fires and sweep my room. After he does enter my service, if some one inquires of him "what his general duties are," and he answers, "they are to build my fires and sweep my room," I do not think that such servant in making such an answer merely guesses or gives his opinion. I think he testifies to matters within his own personal knowledge. It is always competent for a witness to state what services are performed by him in any business or employment, and when we ask a witness to state his general duties in any service or employment the inquiry involves the general services performed by him in such employment. Therefore, I think that when Steele was called upon to testify as to the general duties of the plaintiff, of which he

had actual knowledge, the inquiry was the same as what services were performed by him as fireman; this and nothing more.

My conclusion is that where the general duties or general services of a servant or employe are not prescribed by written orders or rules that any witness having actual knowledge of such general duties or services may testify as to what they are of his own personal knowledge.

I do not think there is anything in these views conflicting with the case of Monroe *vs.* Latin, 25 Kas., 351; or with the City of Parsons *vs.* Lindsay, 26 Kas., 426. In the case of Monroe *vs.* Latin, *supra*, the question was asked: "Then you would not think
172 it negligent, would you, to leave him the horse unhitched just long enough for you to get into the buggy, if the lines are upon the same side of the horse you are going to get in?" The answer was, "I would not consider it negligent." All of this was excluded. Of course this question called solely for an opinion, and the matter did not involve skill or science. In that case the witness did not claim to be an expert, nor can it be in any manner urged that the evidence was upon matters within his own personal knowledge. In the city of Parsons *vs.* Lindsay, *supra*, the court permitted one of the parties, over the objection of the other, to introduce in evidence the opinions of several witnesses that the street-crossing was unsafe and dangerous. No attempt was made to show that the witnesses were experts. I therefore think in that case that the question at issue before the jury, whether the street-crossing was safe or not, should have been left to the jury to be determined, under a statement of all the facts and circumstances within the knowledge of the witnesses as to the condition of the crossing. If Steele had been asked to give his opinion whether the plaintiff was negligent at the time he received his injury, the inquiry would have been of the character declared incompetent in Monroe *vs.* Latin, *supra*. If Steele had been asked to give his opinion whether the plaintiff was acting in an unsafe and dangerous manner at the time he received his injury, such inquiry would also have been incompetent within City of Parsons *vs.* Lindsay, *supra*.

In the dissenting opinion the following question put to the plaintiff is referred to and commented upon: "Did you consider it the proper discharge of your duty at the time for each of you to be look-
173 ing west and that train going east as fast as a man could walk?"

I think that this question was properly excluded, because it seems to me it was asked solely to confuse and mislead the jury.

I do not understand that there is any evidence in the record tending to show that at the time of the injury complained of the fireman and engineer were both looking west. The assumption of fact in the question was wholly unsustained by any evidence before the jury, and therefore the question itself was improper.

A true copy.

[Seal of Supreme Court, State of Kansas.]

Attest:

C. J. BROWN,
Clerk Supreme Court.

174 And thereupon such judgment and decree of the district court of Atchison county, Kansas, was affirmed, and final judgment ordered to be entered against the said The Missouri Pacific Railway Company for said sum of twelve thousand dollars and costs of suit; and, on application of the said Missouri Pacific Railway Company this bill of exceptions is allowed.

Witness my hand and official signature at Topeka, the capital of the State of Kansas, on this 17th day of March, A. D. 1885.

ALBERT H. HORTON,
Chief Justice of the State of Kansas.

I hereby certify that the above and foregoing bill of exceptions was duly allowed by the chief justice of the supreme court of the State of Kansas, and that his signature thereto is genuine.

Witness my hand and official seal this 17th day of March, A. D. 1885.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

175 And on the said March 17, 1885, there was filed in the said supreme court a petition for the allowance of a writ of error, returnable to the Supreme Court of the United States, and for a citation, which, with all the endorsements thereon, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA.

To the honorable the chief justice of the State of Kansas:

The Missouri Pacific Railway Company respectfully shows that on the 7th day of March, A. D. 1885, the supreme court of the State of Kansas rendered a final judgment against your petitioner in a certain cause wherein the Missouri Pacific Railway Company was plaintiff in error, and Patrick Mackey was defendant in error, affirming a judgment of the district court of Atchison county, State of Kansas, in favor of said Patrick Mackey and against your petitioner, for the sum of twelve thousand dollars and for costs, as will appear by referring to the record and proceedings in said cause, and that said supreme court of the State of Kansas is the highest court of said State in which a decision in said suit could be had; and your petitioner claims the right to remove said judgment and proceedings to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because the cause of action set forth in the petition of said Patrick Mackey, and on which petition and cause of action said judgment for twelve thousand dollars and for costs of suit was rendered, is based solely upon the following act of the Legislature of the State of Kansas, to wit:

An act to define the liability of railroad companies in certain cases.

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. Every railroad company organized or doing
176 business in this State shall be liable for all damages done to

any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage.

SECTION 2. This act shall take effect from its publication once in the "Kansas Farmer."

Approved February 26, 1884, as appears by the record of the proceedings in said cause, which is herewith submitted.

And your petitioner claims that such act of the Legislature of the State of Kansas is in conflict with that portion of the Constitution of the United States of America which reads as follows, to wit:

Article fourteen.

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and especially that portion of said article 14, section 1, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for a citation.

177 And your petitioner will ever pray.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Petitioner.*
EVEREST & WAGGENER,
Attorneys for Petitioner.

Let the writ of error issue, upon the petitioner, The Missouri Pacific Railway Company, entering into an undertaking *to* the said Patrick Mackey in the sum of twenty-five thousand dollars, conditioned as by law in such case made and provided.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

(Endorsed:) Filed March 17, 1885. C. J. Brown, clerk supreme court.

178 And on said March 17, A. D. 1885, there was also filed a bond and undertaking approved by the chief justice, a copy of which is as follows, to wit:

Bond.

Know all men by these presents that we, The Missouri Pacific Railway Company, as principal, and W. W. Hetherington, as surety, are held and firmly bound unto Patrick Mackey in the sum of

twenty-five thousand dollars, to be paid to the said Patrick Mackey, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals [and] dated this 17th day of March, A. D. 1885.

Whereas the above-named The Missouri Pacific Railway Company have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in a certain action pending in the supreme court of the State of Kansas, wherein the Missouri Pacific Railway Company was plaintiff in error and the said Patrick Mackey was defendant in error: Now, therefore, the condition of this obligation is such that if the above-named The Missouri Pacific Railway Company shall prosecute said writ of error to effect and answer all costs and damages, and well and truly pay the whole amount of the judgment in said case, including just damages for delay, costs, and interest in full, should such judgment of the supreme court of the State of Kansas be affirmed, and shall prosecute the writ of error to effect, then this obligation to be void; otherwise to remain in full force and effect.

THE MISSOURI PACIFIC
RAILWAY COMPANY,

By W. W. FAGAN, *Superintendent.*
W. W. HETHERINGTON.

Sealed and delivered in the presence of—
D. P. WAGGENER.

179 UNITED STATES OF AMERICA }
District of Kansas, } *ss:*

W. W. Hetherington, being first duly sworn, deposes and saith that he is worth the sum of twenty-five thousand dollars over and above all his just debts and liabilities.

W. W. HETHERINGTON.

Sworn to before me this 17th day of March, A. D. 1885.

[SEAL.] H. K. FORD,
Notary Public, Atchison, Kansas.

My com. expires March 21, 1885.

I approve the above bond and the sufficiency thereof.

ALBERT H. HORTON,
Chief Justice of the Supreme Court of the State of Kansas.

180 And on said March 17, A. D. 1885, there was also filed with the clerk of the said supreme court of the State of Kan-

sas the writ of error, the original of which is hereunto attached, and is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said — court of Kansas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Missouri Pacific Railway Company, plaintiff in error, and Patrick Mackey, defendant in error, wherein was drawn in question the validity of a statute of and an authority exercised under said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity, and wherein was drawn in question the construction of a clause of the Constitution, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and pro-
181 ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas,
By FRANK J. THOMAS, *Deputy.*

182 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said — court of Kansas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Missouri Pacific Railway Company, plaintiff in error, and Patrick Mackey, defendant in error, wherein was drawn in question the validity of a statute of & an authority exercised under said State, on the ground of their being repugnant to the Constitution & laws

of the United States, and the decision was in favor of such their validity, & wherein was drawn in question the construction
183 of a clause of the Constitution, a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 17th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

[The Seal of the Circuit Court of the United States, District of Kansas, 1882.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States
for the District of Kansas,
By FRANK J. THOMAS, *Deputy.*

Allowed by—
——.

[Endorsed:] Filed Mar. 17, 1885. C. J. Brown, clerk sup. court.

184 And on March 17, A. D. 1885, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the words and figures following, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Patrick Mackey and his attorneys of record, Thomas P. Fenlon and John C. Tomlinson, Greeting:

You are hereby cited and admonished to be and to appear at the Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action wherein the Missouri Pacific Railway Company is plaintiff in error and Patrick Mackey is defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Albert H. Horton, chief justice of the su-

preme court of the State of Kansas, this 17th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

ALBERT H. HORTON,
Chief Justice of the State of Kansas.

Witness my hand and official signature, at Topeka, the capital of the State of Kansas, on the 17th day of March, A. D. 1885.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

(Endorsed:) We hereby waive service of the within citation and enter our appearance for Patrick Mackey, defendant in error, in the Supreme Court of the United States; and service of the
185 within citation is hereby acknowledged this 17th day of March, A. D. 1885.

PATRICK MACKEY,
By JNO. C. TOMLINSON AND
THOS. P. FENLON,
His Attorneys.

[Endorsed:] Filed March 17, 1885. C. J. Brown, clerk supreme court.

STATE OF KANSAS, *ss:*

Supreme Court.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings, of the record of proceedings had, of the judgment rendered, and of the syllabus and opinion filed in the above-entitled cause as the same remain of record and on file in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office in Topeka, this 17th day of March, A. D. 1885.

[Seal Supreme Court State of Kansas.]

C. J. BROWN,
Clerk Supreme Court of the State of Kansas.

Endorsed on cover: Kansas supreme court. No. 512. The Missouri Pacific Railway Company, plaintiff in error, *vs.* Patrick Mackey. Filed March 25, 1885.

preme court of the State of Kansas, this 17th day of March, in the year of our Lord one thousand eight hundred and eighty-five.

ALBERT H. HORTON,
Chief Justice of the State of Kansas.

Witness my hand and official signature, at Topeka, the capital of the State of Kansas, on the 17th day of March, A. D. 1885.

[SEAL.] C. J. BROWN,
Clerk of the Supreme Court of the State of Kansas.

[Endorsed:] We hereby waive the service of the within citation and enter our appearance for Patrick Mackey, defendant in error, in the Supreme Court of the United States, and receive of the within citation the service acknowledged this 17th day of March, A. D. 1885.

PATRICK MACKEY,
By JNO. C. TOMLINSON AND
THOS. P. FENLON,
His Attorneys.

[Endorsed:] Filed March 17, 1885. C. J. Brown, clerk supreme court.

STATE OF KANSAS, }
Supreme Court.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true and complete copy of the pleadings of the record of proceedings had, of the judgment rendered, and of the syllabus and opinion filed in the above-entitled cause, as the same remain of record and on file in my office.

In Witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the State of Kansas, at my office in Topeka, this 17th day of March, A. D. 1885.

[SEAL.] C. J. BROWN,
Clerk Supreme Court of the State of Kansas.

Endorsed on cover: Kansas supreme court. No. 5129. The Missouri Pacific Railway Company, plaintiff in error, vs. Patrick Mackey. Filed March 25, 1885.

127-205

Supreme Court U. S.
FILED
MAR 12 1888
JAMES H. MCKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887,

No. 218.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

against

PATRICK MACKEY.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE, JR.,
Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1887.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
AGAINST
PATRICK MACKEY.

No. 218.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

Mackey, the defendant in error, while in the employ of the Missouri Pacific Railway Company, plaintiff in error, as fireman, was injured in the State of Kansas in a collision, the result, as alleged in his petition or complaint, of the "*negligence of his fellow servant, the engineer*" [Record, p. 3, Court's Charge, Record, pp. 119, 120, 121, 122, 124]. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff, Mackey, for the sum of $12,000. A motion for a new trial was overruled, and the defendant thereupon filed its petition in error in the Supreme Court of Kansas, which Court affirmed the judgment below.

From that judgment of affirmance the Railway Company prosecutes this writ of error.

The case is brought here under R. S., § 709, upon the claim by the Railway Company that there was drawn in question the validity of the statute of the State of Kansas (set out in the following Assignment of Error), upon the ground of its being repugnant to the Constitution of the United States, the judgment of the State Court being in favor of the validity of the statute.

Under the view taken by this Court of its functions in reviewing the judgments of the highest State Courts, we refrain from any review of the facts or evidence touching the question of contributory negligence, or bearing upon any other than the Federal question involved. For the same reason we forbear reference to other grounds for reversal urged below, and make only the following

Assignment of Error.

The Court erred in rendering a decision in favor of the validity of the following statute of the State of Kansas:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such injury" [Laws of Kans., 1874, Ch. 93, § 1; Comp. Laws of Kans., p. 776].

The validity of this statute was drawn in question on the ground of its being repugnant to the Constitution of the United States, viz.: to that part of the

Fourteenth Amendment of said Constitution which provides as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Federal question was properly raised below.

The constitutional objection was raised at various stages in the Court below.

1st. By answer (Record, p. 5). It is unnecessary under the Kansas practice to plead it specifically; it is sufficiently raised under a general denial.

2d. By motion for judgment on the pleadings (Record, p. 7).

3d. By defendant's request to the Court for instructions to the jury (Record, p. 118, Instruction Asked, No. 45), as follows:

"The jury are instructed, if they find from the evidence that the plaintiff was injured through the carelessness of a fellow servant, the plaintiff cannot recover;" which instruction was refused, and the defendant duly excepted.

4th. By motion for judgment on the pleadings and findings of fact by the jury (Record, p. 128).

5th. By motion for a new trial (Record, p. 129).

6th. By the petition in error (Record, p. 1), and by

the opinion of the Supreme Court of Kansas (Record, pp. 145, 156–171).

7th. By petition for writ of error, containing specification of the error relied on, which was as follows: (Record, pp. 171 and 172):

"To the Honorable the Chief-Justice of the State of Kansas:

"The Missouri Pacific Railway Company respectfully shows that on the 7th day of March, A. D. 1885, the Supreme Court of the State of Kansas rendered a final judgment against your petitioner in a certain cause wherein the Missouri Pacific Railway Company was plaintiff in error and Patrick Mackey was defendant in error, affirming a judgment of the District Court of Atchinson County, State of Kansas, in favor of said Patrick Mackey and against your petitioner, for the sum of twelve thousand dollars and for costs, as will appear by referring to the record and proceeding in said cause, and that said Supreme Court of the State of Kansas is the highest Court of said State in which a decision in said suit could be had; and your petitioner claims the the right to remove said judgment and proceedings to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States, because the cause of action set forth in the petition of said Patrick Mackey, and on which petition and cause of action said judgment for twelve thousand dollars and for costs of suit was rendered, is based solely upon the following act of the Legislature of the State of Kansas, to wit:

"'AN ACT to define the liability of railroad companies in certain cases.

"'*Be it enacted by the Legislature of the State of Kansas:*

"'Section 1. Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage.

" 'SECTION 2. This act shall take effect from its publication once in the "Kansas Farmer."

" 'Approved February 26, 1884,' as appears by the record of the proceedings in said cause, which is herewith submitted.

" And your petitioner claims that such act of the Legislature of the State of Kansas is in conflict with that portion of the Constitution of the United States of America which reads as follows, to wit:

ARTICLE FOURTEEN.

" 'SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

And especially that portion of said Article 14, Section 1, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

" Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for a citation.

" And your petitioner will ever pray."

ARGUMENT.

I. THE STATUTE OF 1874 OPERATES TO DEPRIVE RAILROAD COMPANIES OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND IS LEGISLATION OF AN UNEQUAL, PARTIAL AND DISCRIMINATING CHARACTER.

Prior to the enactment of the Statute of 1874 the

common law rule of liability of employer for injuries to employees was uniformly applied by the Courts of Kansas; and it was the settled law of that State, applying, without exception, to the relation of master and servant, that where one receives injury through the negligence or incompetency of a fellow servant, the employer is not liable unless he employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or continued him in service after knowledge of his incompetency.

In Dow vs. Kansas Pac. Ry. Co., 8 Kans., 642 (1871), the Court, VALENTINE, J., says :

The paramount object of nearly all the rules of law concerning the operation of railroads is security to the persons and lives of human beings, and particularly security to the persons of passengers being transported on the trains from one portion of the country to another, and in order to insure this security the railroad companies are held to the strictest accountability with regard to passengers. They must use the utmost care and skill within the scope of human foresight or human knowledge practicable. They are liable to passengers for the slightest negligence on the part of their agents and servants. But this is not all. A rule must be adopted that will insure the most skillful and trustworthy agents and servants. It is always greatly to the interest of the company to employ none but the most skillful and trustworthy, first, because of their great liability to passengers for the negligence of their servants and agents; second, because if the company do not use proper diligence in employing skillful and trustworthy servants and agents the company will be liable for the negligence of such servants and agents to other servants and agents. But it is also the policy of the law to make it to the interest of every servant or agent of the railroad company to see that every other servant or agent of the company is competent and trustworthy. This may be done by making it to the interest of every employee of the railway company to inform the company of every act of any other employee

showing a want of skill, care or competency.* The employees of the railway company have the best opportunities of knowing the competency and trustworthiness of other employees of such company, and if they do not think that the other employees are competent or careful, let them either inform the company so that the incompetent or negligent employees may be discharged, or themselves quit the service of the company.

* * * As to passengers, and generally as to any person not in the employ of the company, the negligence of any agent or servant of the company is the negligence of the company. * * * But as between co-employees no one is peculiarly the representative of the company more than another, except perhaps the higher officers, whose duty it is to employ and discharge the other employees, and therefore as between co-employees the negligence of none but the higher officers aforesaid is the negligence of the company."

The same rule, as applied by the Kansas Courts (prior to the statute), is well stated and philosophically discussed by BREWER, J., in the case of *Union Pacific Ry. Co. vs. Milliken*, 8 Kans., 647.

In 1874 the statute set out in the foregoing assignment of error was adopted, and a statutory liability to employees for damages resulting from the negligence of fellow servants was imposed upon railroad companies, and upon them only.

It was conceded that the only authority for the main-

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*NOTE. We have quoted somewhat fully from this opinion because of its aptness as a commentary upon the policy of the statute of 1874. Judge COLE, of the Iowa Supreme Bench, in sustaining the constitutionality of a like statute of that State (though upon other considerations than those affecting the constitutionality of the Kansas statute as here urged), did not refrain from suggesting a doubt of its policy.

"Of its policy, which may tend to relax the diligence of employees for the safety of passengers, since an indemnity for injury to themselves is provided by law, we have nothing to do."

McAunich vs. Miss. & Mo. R. R. Co., 20 Iowa, 344.

tenance of this action must be found in the statute of 1874. It was conceded that in the absence of this Statute no cause of action against the Railway Company would have existed and no recovery could have been had (p. 121).

The sole question upon this record is the constitutionality of this legislation. The statute creates a new liability. No such liability is imposed by the State upon any person, individual or corporation, other than railway companies. No such liability exists at common law. Railway companies are singled out from all the vast multitude of employers of labor to be subjected to the new and special burden and risk imposed by this statute. Their employees are singled out from the great class of the employed to be, at the expense of their employers, the special objects of the favor of the State; to have created for their benefit a right as against their employers, which is in derogation of the common law, and to which others, though in circumstances essentially the same, can lay no claim.

The term "equal protection of the laws," as used in the Constitution, has been thus defined by Mr. Justice FIELD:

"The Fourteenth Amendment to the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws imposes a limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do it cannot deprive any one within its jurisdiction of the equal protection of the laws. And by equal protection of the laws, is meant equal security under them to every one on similar terms—in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the

Courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also *his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions in every form, or under any pretense, are absolutely forbidden.*"

Railroad Tax Cases, 13 Fed. Rep., p. 733.

And again the same learned Justice says:

"Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the Courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind. Within these limits the power of the State exists, as it did previously to the adoption of the amendment, over all matters of internal police."

In re Ah Fong, 3 Sawy., 144, 157.

In *Walley's Heirs vs. Kennedy*, 2 Yerg., 554, it is said:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances; and every private or partial law which directly proposes to destroy or affect individual rights, *or does the same thing by affording remedies leading to similar consequences*, is unconstitutional and void."

Applying these principles to corporations, Mr. Justice FIELD in the cases above referred to (*Railroad Tax Cases*) thus continued:

"In the second place, the State, in the creation of corporations, or in amending their charters, or rather in passing or amending general laws under which corporations may be formed and altered, possesses no power to withdraw them when created, or by amendment, from the guaranties of the federal constitution. It cannot impose the condition * * * that they

shall submit without objection to unequal and oppressive burdens arbitrarily imposed upon them; that, in other words, over them and their property the State may exercise unlimited and irresponsible power. Whatever the State may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution. * * * But whatever property the corporations acquire in the exercise of the capacities conferred, they hold under the same guaranties which protect the property of individuals from spoliation. It cannot be taken for public use without compensation. It cannot be taken without due process of law, nor can it be subjected to burdens different from those laid upon the property of individuals under like circumstances."

To the effect that corporations equally with individuals are persons within the meaning of such constitutional provisions as that here under discussion, see also

Santa Clara Co. vs. Southern Pac. R. R. Co., 118 U. S. 396.
U. S. vs. Devaux, 5 Cranch, 86.
Marshall vs. B. & O. R. R. Co., 16 How., 326.
N. W. Fert. Co. vs. Hyde Park, 3 Biss., 481.
Railroad Co. vs. Richmond, 96 U. S., 529.

No justification for the statute can be found in any supposed analogy between the liability which it creates and the liability at common law for injuries to passengers. The statute cannot be justified by the assertion that it merely provides for a more extended operation of the common law rule of "*respondeat superior*" and merely enlarges the number of cases where the negligence of the servant is to be imputed to the master. Whatever results may be said to flow from the

law ; however it may be sought to assimilate it to other laws or rules of law, it remains that no such liability existed at common law ; that the liability created by this statute is a *new liability in derogation of common law*, fixed under no approved principle of the exercise of legislative power, and limited in operation to persons artificially and arbitrarily classified.

The vice of the statute is obvious when it is considered that *the liability or penalty prescribed is incurred without violation of law or infraction of duty ;* that the statute provides *no rule or test of negligence*, it provides *no standard of diligence or care to which railway companies may conform and exempt themselves from penalty.* It is a law requiring a limited number of persons—railroad corporations—to respond in damages for the wrongs of third persons. It is a statute requiring railroad corporations to assume involuntarily the insurance of the lives and limbs of their employees—a statute disabling railroad companies from employing labor except upon a contract which shall have the element of insurance to the employee. No other employers or class of employers are required to assume such a risk or to make contracts of employment involving such a condition of liability. The compulsion results solely from the statute, and the statute is a repeal of the common law.

The constitutional inhibition includes legislative discrimination against classes as well as against races and individuals.

In the Civil Rights cases (101 U. S., 3) this Court said :

" The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation

which has the effect of denying to any race or class, or to any individual, the equal protection of the law."

To the same effect is the language of this Court in the case of Missouri vs. Lewis, 101 U. S., 22.

It is a misleading and specious defense of the statute to argue that it is not a partial and discriminating law because its operation is uniform upon the class which it affects. It is true that all railroad companies organized or doing business in the State are subjected equally to the exceptional burdens which it imposes, and that all employees of such companies are equally afforded the exceptional rights and remedies which it creates. But unless the classification thus made has a just relation to a legitimate legislative purpose, it will not relieve the law from the objection that it operates unequally. An arbitrary and artificial classification will not support unequal and partial legislation.

Cooley Const. Lim. (4th Ed.), p. 449.

A rational standard of classification is essential to the validity of any law having less than universal operation.

Such a rational standard of classification is found in those legislative enactments which require manufacturing concerns to provide fire-escapes for the safety of their operatives; which, in consideration of the public health, confine noxious trades to specified localities; which, in the protection of life and property require railroad companies to fence their tracks; and which, generally, in carrying out the recognized and proper objects of police control, regulate particular manufactures, trades, businesses and undertakings *as their peculiar incidents and characteristics* may necessitate

regulation in the interest of public health, morals, safety and general welfare. A classification strictly required by the legitimate purposes of such legislation does not deprive the law of an equal operation. In such a case the law operates equally upon all those included within the proper scope of its operation; and the scope of its operation is restricted or enlarged as the evil to be dealt with is limited or extended. Thus is the case of Humes vs. Missouri Pacific Railway Co., 115 U. S., 512, where the question was upon the constitutionality of a law of Missouri requiring railroad companies to fence their tracks on penalty of double damages for losses occasioned through omission to fence, this Court, speaking by Mr. Justice FIELD, said:

"The objection that the statute of Missouri violates the clause of the Fourteenth Amendment, which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates and cattle guards is exacted when its road passes through, along or adjoining inclosed or cultivated fields or uninclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. See on this point, Barbier vs. Connolly, 113 U. S., 27, and Soon Hing vs. Crowley, 113 U. S., 703."

The classification presented in the case last referred to is in no sense artificial or arbitrary. The purpose of the law, requiring the maintenance of fences, was a salutary one, and the operation of the law was upon all engaged in the business to which this salutary purpose was directed, and upon all to whom the legislation

could appropriately or legitimately have applied. But if a law, affecting railroad companies only, be enacted *in disregard of the principles which sanction such classification*, it will be a partial, discriminating and unequal law notwithstanding it may operate equally upon all within the class thus arbitrarily selected. The same learned JUSTICE who used the language last quoted has forcibly pointed this out in the *Railroad Tax Cases*, 13 Fed. Rep., 723, where he held that in the provisions of the Constitution of California prescribing different modes of assessing the value of the property of natural persons and the property of *railroad companies* as the basis of taxation, there was a departure from the rule of equality and uniformity, and, hence, that these provisions violated the inhibitions of the Federal Constitution. In his concurring opinion in the same cases *(Railroad Tax Cases)*, SAWYER, J., thus warns of the vicious results which might flow from a misconception or perversion of this doctrine of classification:

"If the arbitrary discrimination and classification found in this case can be legally made under the Constitution and the law of the land, then the Constitution or the law can be so framed as to dispose of a man's rights in property of all kinds by arbitrary classification and definition, without regard to the real facts, circumstances or condition of the property. *A person may be classified and defined out of the equal protection of the law;* and if so with reference to this provision, he can also be classified and defined *out of uniformity in the operation of the law* in other particulars; *out of the protection of due process of law*, and of the provision forbidding a law impairing the obligation of contracts, or taking property for public use without just compensation; and, indeed, *out of all the guaranties of the Constitution*, State or national."

The statute of 1874 does not deal with or regulate the

relations of railroad companies to the State. It does not establish a classification, for general legislative ends, or for legitimate purposes of public welfare or concern. Its operation is solely upon the single case of private relationship with which it deals. To this relationship is attached burdens on the one hand and privileges on the other to which the same relationship in no other case is subject under the general rules of law. A right and remedy are given to railroad employees which no other employee may assert. A defense is withdrawn from railroad companies, as employers, which every other employer, corporate or individual, may assert. In cases arising upon the statute railroad companies are denied " the right to resort, on the same terms with others, to the courts of the country for the security of their property." Railroad companies are made answerable, in a purely private relationship, under a rule of law absolutely exceptional.

In none of the decisions of the Courts of Iowa or Kansas (the States in which this statute has been adopted) is the assumed basis of classification clearly disclosed. The statute itself is silent in this respect. It is intimated, however, by the Courts of those States, that the statute is a police regulation of the use of property, and as such not obnoxious to the objection that it creates an unconstitutional inequality of burden or privilege.

We may, we think, assume that the only conceivable defense of the statute is made when it is asserted to be a police regulation; and that we may properly discuss it as attempted legislation of this character.

II. THE STATUTE OF 1874 CANNOT BE SUSTAINED AS AN EXERCISE OF THE POLICE POWER.

In the early decisions of the Kansas Courts, construing the Statute of 1874, it was intimated that the statute had its reason in a consideration of the hazards of railway operation, and that the act "embraces only those persons more or less exposed to the hazards of the business of railroading."

Mo. Pac. Ry. Co. vs. Haley, 25 Kans., 35.

The inference from this language, that the statute was not construed to extend to such employees of railroad companies as were not exposed to the hazards of actual operation of the road, is disposed of in the recent decision of the same Court in the case of Union Pacific Ry. Co. vs. Harris (1885), 33 Kans., 416, where such an implied limitation upon the operation of the statute is clearly denied. We shall have occasion to refer to this case at a later stage of our argument (see *post*, p. 25–27).

But, as the statute is defended *as a police regulation of the use of property*, we may concede for the purposes of this branch of our argument that the hazards of railroading were ostensibly considered in its enactment.

We do not argue that railway employees do not constitute one of the numerous classes engaged in hazardous employment. We do not argue that they are not entitled, in virtue of their situation, to such protective legislation prescribing and controlling the use and operation of railway property,—in other words, to the protection of such legitimate police regulations as shall, in the legislative judgment, be best calculated to reduce

the perils of their occupation, and to guard them most effectually against those hazards which no human prudence and wisdom can entirely remove and which are the necessary incidents of the employment.

But the power to legislate to this end is not a power to be exercised irresponsibly and without condition. The statutes so enacted must be within the constitutional competency of the Legislature to enact. They must be reasonable, and fairly devised as regulative measures for protection or prevention. "In short, they must be police regulations in fact."

"Like other powers of government, there are constitutional limitations to its exercise. It is not within the power of the General Assembly, under the pretense of exercising the police power of the State, to enact laws not necessary to the preservation of health and safety of the community that will be oppressive and burdensome upon the citizen. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety or welfare of society, it would be an unauthorized exercise of power, and it would be the duty of the Courts to declare such legislation void" (T. W. & W. R. W. Co. vs. City of Jacksonville, 67 Ill., 40).

The doctrine is well stated in the case of the People vs. Jackson Plank Road Co., 9 Mich., 307, where it is said :

"Powers, the exercise of which can only be justified on this specific ground, and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort or well-being of society, or so imperatively required by the public necessity, as to lead to the rational and satisfactory conclusion, that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

What are *reasonable* police regulations and what are proper subjects of the exercise of the police power are purely judicial questions.

1 Rorer on Railroads, p. 563.
Chicago & C. R. R. Co. vs. People, 67 Ill., 11.
P. W. & B. R. R. Co. vs. Bowers, 4 Houst., 506.
Sloan vs. Pacific R. R. Co., 61 Mo., 24.
Ladd vs. Southern C. P. & M. Co., 53 Tex., 172.

Admitting it to be competent to protect by exceptional legislation a favored class of employees, engaged in an employment of intermediate danger and hazard—such protection could not under any legitimate exercise of police power be afforded except by a regulation of the USE of their property by the railroad companies. The maxim which is applied in every valid exercise of the police power is "*Sic utere tuo ut alienum non laedas.*"

"As in all other cases of the exercise of the police power, the police regulations of corporations must be confined to the enforcement of the maxim, *sic utere tuo ut alienum non laedas*, subject to the observance of which every corporate charter must be supposed to have been granted."

Tiedeman's Lim. Pol. Power, p. 584.
See also Cooley's Const. Lim., p. 715 and note.
Thorpe vs. Rutland & B. R. R. Co., 72 Vt., 149, opinion per REDFIELD, Ch. J.

"The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers.

In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise. The maxim, *sic utere tuo ut alienum non laedas*, is that which lies at the foundation of the power; *and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend.*"

Cooley's Const. Lim., 719.
See also 3 Wood's Railway Laws, p. 1703.
Pierce on Railroads, p. 465.
Munn vs. Illinois, 94 U. S., 124, 125.

But this Statute of 1874 is in no possible view *a regulation of the use of property.* It neither requires the Railway Companies to do nor to refrain from doing any act—it enjoins no duty whatever. *It merely establishes a liability independent of any duty.* To such a statute, justified as is here attempted, as an exercise of police power, the following language of Judge COOLEY is very applicable:

"Carriers of goods are liable as insurers, notwithstanding they may have been guiltless of negligence, because such is their contract with the shipper when they receive his goods for transportation; but carriers of persons assume no such obligations at the common law; and where a company of individuals receive from the State a charter which makes them carriers of persons, and chargeable as such for their own default or negligence only, it may well be doubted if it be competent for the Legislature afterwards to *impose upon their contracts new burdens, and make them respond in damages where they have been guilty of no default.* In other words, whether that could be a proper police regulation which *did not assume to regulate the business of the carrier with a view to the just protection of the rights and interests of others,* BUT WHICH IMPOSED A NEW OBLIGATION, FOR THE BENEFIT OF OTHERS, UPON A PARTY GUILTY OF NO NEGLECT OF DUTY."

Cooley's Const. Lim., nt., pp. 724, 725.

Laws enacted in the interest of public welfare and

safety, prescribing salutary regulation of the use of property and attaching penalties to the violation of duties thus enjoined, are undoubtedly valid and constitutional. Apt illustrations of the legislative power in this respect are suggested in the opinion in the case of Humes vs. Missouri Pacific Railway Co., 115 U. S., 512 (*ante*, p. 13), where Mr. Justice FIELD, speaking for this Court, says (p. 522):

"The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the State or the municipality exercising a delegated authority prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials, forbids the storage therein of powder, nitro-glycerine and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences, having gates at crossings, and cattle guards."

The judicial mind will readily distinguish between legislation of the character described in the foregoing language of this Court and legislation which does not "impose a duty in which the public is largely interested," which, in fact, imposed no duty whatever, lays down no rule of conduct whatever, but imposes an in-

evitable penalty upon a party guilty of no failure to comply with any known requirements of law.

It has been well said that "a law that lays down no rule of conduct, that neither commands nor forbids, cannot be a police regulation." It is obviously a misnomer to style that law a police regulation which regulates nothing, but merely creates a liability irrespective of the breach of any rule of conduct.

The only reasoning upon which it may be suggested that the statute was even intended as a police regulation is the sinuous and unsatisfactory reasoning which results in the theory that the Legislature sought to induce a greater degree of care in the selection of railroad employees through the pressure upon the companies of apprehended liability, and that the Legislature was of opinion that the lives and limbs of employees through the additional and interested care thus induced would receive increased protection. If this theory of the purpose of the law is correct (and any other theory attributing proper purpose to the statute will be found to have even less reason and plausibility) the vice of the statute becomes obvious. In this view the *purpose* of the statute bears no relation to the *liability imposed.* The design of the statute may be accomplished through the exercise of the most scrupulous and unimpeachable care on the part of railroad companies in the selection of their employees, and yet the liability continues irrespective of this. The liability far outruns the purpose of the statute—it has no relation to the purpose. It is a liability from which the railroad companies cannot exempt themselves by the most exact fulfillment of their obligations. The opinion of the Supreme Court

of Illinois in the case of Ohio & Miss. R. R. Co. vs. Lackey, 78 Ill., 55, bears strongly upon these considerations. The Court say:

"In 1855 the General Assembly of this State passed an act entitled 'An Act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers,' in the second section of which act it is provided that 'every railroad company running cars within this State shall be liable for all expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise; and any coroner, city, town or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company, before any court having competent jurisdiction' (Sess. Laws 1855, p. 170; Scates' Comp., 423).

"It is insisted by appellant that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. * * *

"It may, very pertinently, be asked, *why this distinction? On what principle is it that railroad corporations, without any fault on their part,* shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

"An examination of the section will show that no default or negligence of any kind need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhi-

bition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute" (Ohio & Miss. Ry. Co. vs. Lackey, 78 Ill., 56).

The foregoing Illinois statute of 1855 was for these reasons held to be unconstitutional and void.

If it be supposed that the aim of the Kansas statute of 1874 was, through the menace of the liability created, to induce a more vigilant care in the selection of employees, an anomalous situation is presented, inasmuch as the accomplishment of the purpose of the statute is entirely immaterial to the question of liability,—the railway companies being not only denied the right to exempt themselves from penalty by showing that they have exercised the degree of care at which the statute aimed, but the fact, in this respect, *being conclusively presumed against them.*

In the case of Zeigler vs. South and North Ala. R. R. Co., 58 Ala., 594 (1877), the question was upon the constitutionality of the statute: "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this State, shall be liable for all damages to live stock or cattle of any kind, caused by locomotives or railroad cars." This statute was held to be unconstitutional. The Court, STONE, J., said:

"This statute declares that railroad corporations shall be liable, and make compensation to the owner for all damages to live stock caused by their locomotives or trains, without reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person

owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury (Section 3 of the Act). It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown to authorize a recovery: ownership of the property, and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train the law assumes to determine or dispense with. Is this 'due process of law,' under section 7 of the declaration of rights?" After quoting various definitions of the term "due process of law" including that of Mr. Webster in the *Dartmouth College Case*, and others quoted in Cooley's Const. Limitations at page 355; the Court continued: "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof every material fact which bears on the question of right in the matter involved. *If any question of fact or liability be conclusively presumed against him*, this is not due process of law. We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But, at the same time, we decided that the Legislature could not constitutionally ordain that such proofs should be conclusive evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as a confiscation of property. [Cases cited.] We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that a railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees; an injury which no human prudence or foresight could prevent. And yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short

of due process of law. We have heretofore declared a rule which exacts from railroad corporations a high degree of skill and diligence, to prevent injury to persons and property. [Cases cited.] We have no wish to modify that rule. But when these very useful corporations conform to this strict rule of diligence, we can perceive no reason, in law or morals, for holding them to a stricter measure of accountability for inevitable misfortunes than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert."*

See also Memphis & C. R. Co. vs. Lyon, 62 Ala., 71.

In the case of Union Pacific Ry. Co. vs. Harris, 33 Kans., 416 (1885), the Supreme Court of Kansas construed the statute of 1874 to cover the cases of injured employees of railroad companies without regard to the fact that their employment was not in connection *with the actual operation* of the railroad. In that case the

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* NOTE: The States of Massachusetts, Maine and New Hampshire have statutes providing for liability of Railroad Companies for injuries resulting from fire communicated by their locomotives, and investing the companies with an insurable interest in property along their routes. These statutes have been frequently construed in their application to diversified states of fact; but we have been unable to find any opinion dealing with the question of their constitutionality. Inasmuch as the constitutionality of these statutes has never been, so far as we know, the subject of adjudication, we deem it superfluous to attempt to distinguish them, in respect to the principle underlying them, from the Alabama statute above referred to, or from the statute in the case at bar.

The following cases relate to the statutes referred to in this note:

Hart vs. West. R. R. Co., 13 Met., 99.
Lyman vs. B. & W. R. R. Co., 4 Cush., 288.
Ross vs. B. & W. R. R. Co., 6 Allen, 87.
Ingersoll vs. S. & P. R. R. Co., 8 Allen, 438.
Perley vs. Eastern R. R. Co., 98 Mass., 414.
Safford vs. B. & M. R. R., Co., 103 Mass., 583.
Pierce vs. W. & N. R. R. Co., 105 Mass., 199.
Adden vs. White, Mts. R. R. Co., 55 N. H., 413.
Chapman vs. A. & St. L. R. R. Co., 37 Me., 92.
Pratt vs. A. & St. L. R. R. Co., 42 Me., 579.

plaintiff was a section-man engaged in repairing the railway track. He was injured through the negligence of others, engaged in the same work, in the course of unloading rails from a push-car. The Court, through HORTON, C. J., said :

"To the following question, 'Does the evidence show that it was any part of the duty of plaintiff to ride upon the cars of defendant,' the jury, in their special findings of fact answered 'no.' At the common law, it is well settled that the railway company would not be liable to the plaintiff for the damages sustained by him, under the findings of fact. The rule of the common law, however, has been changed in this State by the Statute of 1874, § 1, Ch. 93. This statute reads

[Statute is here set out]

* * * The contention on the part of the railway company is, that the employee, in order to recover under the statute, must have received his injury through the negligence of a co-employee while they, or either of them, were in the use and operation of the railway ; and it is the further contention, that the findings in this case do not establish that either the injured employee or the negligent ones were engaged in the use and operation of the railway. As conclusive counsel cites *Smith vs. Railway Co.*, 59 Iowa, 73 ; *Malone vs. Railway Co.*, 61 Iowa, 326. This State adopted the Statute of 1862 of Iowa. The statute of that State, however, was changed in 1872 so as to allow employees of railway companies to recover against the companies for injuries received from the negligence of co-employees, only 'when such willful wrongs are in any manner connected with the *use and operation* of the railroad as owned and operated, or on or about which they shall be employed.' The Code of Iowa for 1873, now in force, slightly changed the Statute of 1872, but embraces the words, 'when such wrongs are in any manner connected with the *use and operation* of any railway' (Iowa Code of 1873, § 1307, p. 238). The decisions of the Supreme Court of Iowa construing the Statute of 1872 and 1873 are therefore not strictly applicable to the case at bar.

* * * In the case before us, at the time of the injury complained of, plaintiff below was in the employ of the railway company, and was actually *engaged in*

the business of the company upon its roadbed and track, in the work of replacing old rails of the track with new ones, and while assisting in removing a rail from a push-car upon the track, he was injured without fault on his part by the negligence of his co-employeees. With our construction of the statute there is nothing in the petition or findings of fact to prevent his recovery."

The result of this decision is that the only limitation upon the operation of the statute is that "if there is an employer and employee, but not business of a railway company to be engaged in, then the case is not within the act;" but it it is not a condition of liability that the business engaged in shall have any connection with the "*use and operation of the railway*" (see Opinion of HORTON, C. J., S. C., p. 420). The essentials are only that a railroad company shall be the employer, and that at the time of the injury the injured employee shall have been engaged in transacting *some business* of the company—no matter what—whether engaged in operating the trains of the company or in keeping its books. The character of the employer, *not the nature of the employment*, determines the liability. A clerk in the bookkeeping or legal department of a railway company if injured by the negligence of a fellow clerk, may recover against the company; while a clerk in the employ of a corporation of any other class, or of an individual, who may sustain injuries of precisely the same character and under precisely the same circumstances, is without a like remedy, merely because he is not engaged in the business of a railroad company. It is futile to attempt to emphasize the discrimination. It must be obvious that no theories of police regulation, no rules of classification for legislative purposes, can be

resorted to in support of such palpable discrimination. Construing the statute of Iowa on this subject, the Supreme Court of that State, in the case of Deppe vs. Railroad Company, 36 Iowa, 55, said that,

> " If the statute should be so construed as to apply to all persons in the employ of railroad corporations without regard to the business they were employed in, then it would be a clear case of class legislation, and would not apply upon the same terms to all in the same situation, and hence would be unconstitutional, and manifestly so. * * * The law, then, would not have a uniform operation, but would be violative of the Constitution, just as much as a law that should prescribe, under the same circumstances, different liabilities for merchants, for mechanics and for laborers."

The construction here discussed is precisely the construction which the Kansas Supreme Court has put upon the Statute of 1874—and necessarily so. The language of the statute is much too broad to admit of a limitation which in other States has been made in express terms. The qualification expressed in the words " where such wrongs are in any manner connected with the use and operation of the railroad " is too radical to be incorporated into the statute by intendment or construction. It is not to be supposed that the statute was passed in temporary forgetfulness of the fact that the employees of railroad companies are not all train hands. The term " any employee " will bear no other construction than that put upon it in the case of Union Pacific Ry. Co. vs. Harris (*supra*).

We submit that the decision last cited gives the statute an operation far beyond the scope of a legitimate police regulation, even if that aspect could be given it in any phase of its operation.

The validity of this legislation will be determined by

this Court not with regard to the independent application of the statute to the facts of the case at bar. The statute will be examined in the light of its construction by the Supreme Court of Kansas. The construction put upon it by that Court will afford the test of its constitutionality. It matters not that, as applied to the facts of a particular case, the statute may have a constitutional aspect.

"The constitutional validity of a law is to be tested, not by what has been done under it, *but what may, by its authority, be done.*"

Stuart vs Palmer, 74 N. Y., 188.

If in its broad scope and comprehension, as it has been given effect by the highest Court of the State of Kansas, the statute of 1874 is an unconstitutional enactment, then it *never was a law for any purpose or for any case*, and no matter how persuasive may be considerations of a particular case, it cannot be called into vitality.

It is difficult to conceive of legislation against railway companies of a character so extreme that it may not with some plausibility be defined as a police regulation. It is difficult to conceive of a case of this kind where the ready defense of this misnomer is so patently specious as to require no argument to dispose of it. The police power is a power so comprehensive, so undefined and so apparently incapable of exact limitation that it has become the natural refuge and sanctuary of questionable legislation. We cannot suppose, however, that even the limitations that in general legal theory rest upon the exercise of this power will be swept away by an adjudication of this Court which

will leave State legislatures in possession of an uncontrolled faculty to destroy corporate property under the pretense of regulating its use. If this statute be sustained, and the power assumed in its enactment be recognized, it will require something more than ordinary sophistry to maintain that railway companies hold their their property under the protection of constitutional guaranties.

A statute which prescribes no rule of conduct, but merely creates a liabilty; which prescribes no standard or test of compliance with its purpose; from the penalty of which there are no means of exemption; which contains no recital or suggestion beyond the arbitrary imposing of an inevitable penalty, and which lays its special burdens upon railroad companies alone, without a pretense of proper basis of classification, does not disclose the ordinary motives of police regulation. The motive of the statute may, by a logic not difficult and quite direct, be referred to those considerations that have given rise to the historic series of enactments, directed against railroad corporations, which have strained the constitutional safeguards of the Northwestern States.

III. THE ACT IS UNCONSTITUTIONAL BECAUSE IT CREATES AN INEQUALITY OF BURDEN—DENIES "THE EQUAL PROTECTION OF THE LAWS"—AS BETWEEN COMPANIES AND INDIVIDUALS OPERATING RAILROADS.

The burden of the liability created by the statute is imposed only upon corporations ("every Railroad Company organized or doing business in this State shall be

liable," &c.); all other persons operating railroads in the State of Kansas are exempt from this liability. This Court will not assume that the operation of railroads is exclusively by corporations. Such an assumption is not only without foundation in the record, but it would be contrary to fact. The operation of railroads is a field of enterprise which is open to individuals as well as to corporations. If the reason of the statute in question rests in the character of the business with which it deals, the law cannot be otherwise than unequal, and repugnant in this respect to the Constitution because it burdens with special liability only a part of a class.

In *Louisville & N. R. R. Co. vs. R. R. Commission of Tenn.*, 19 Fed. R., 679, BAXTER, J., says:

"The act furthermore conflicts with the eighth section of the eleventh article of the State Constitution and the Fourteenth Amendment to the Constitution of the United States." * * * It is not necessary for us to undertake, in this case, to define the boundaries or limit the operation of these just constitutional restrictions upon legislative authority. Their general object is to secure to all citizens in like circumstances an equality of legal rights, and to protect minorities and other interests not strong enough to protect themselves against the aggressions of the majority; to restrain all injurious legislative discrimination against persons and property; to compel an equal distribution of the burdens of government upon every citizen, natural or corporate, coming fairly within the purview of the law; and to give to every one an equal right to invoke the remedies prescribed by law for the redress of wrongs done, either to his person, reputation or property. Such, we say, is the general purpose and intent of these constitutional provisions. The accuracy of this interpretation is not, as we understand, questioned by the defendants. Their contention is that railroad property is, in many respects, peculiar in its characteristics and uses, requiring legislation peculiarly adapted

to them, and that to so legislate is not within the prohibitions of the foregoing constitutional guaranties, as, for instance, the enactment of a statute to regulate the running of trains by railroads. We admit the contention that it is competent for the legislature to enact laws for the government and regulation of railroads, and that the same would not be rendered invalid because of their non-applicability to other and dissimilar properties. But it does not follow that the Legislature can enact statutes applicable as well to other kinds of property as to railroads, and therein discriminate so as to impose heavier burdens on one than are imposed on the other. Certainly, they cannot so distinguish as between different railroad companies or between railroad corporations and persons operating railroads in competition with them. Nevertheless, the act in question, if valid, has made this discrimination in the most direct and positive terms. Although it professes to provide for the regulation of railroad companies and persons operating railroads in this State; and, although both are common carriers by rail, use the same kind of machinery and motive power, are under equal obligations to the public and to their patrons, and compete in business, railroad corporations are thereby burdened with pains and penalties not imposed on persons operating railroads in competition with them. By the first section of the act both are declared amenable to "injured parties" for the causes therein enumerated. But the third section, prescribing penalties in favor of the State, as hereinbefore stated, for charges made in excess of what a jury may subsequently find in manner aforesaid and upon the basis stated, to be more than just and reasonable compensation, or unjust and unreasonable discrimination, is expressly confined to corporations. Under this section, corporations are subject to be sued, harassed and worried by expensive and ruinous litigation, and to the payment of the penalties and costs therein provided, while persons operating railroads in active competition with them, engaged in the same kind of *quasi* public service and under the same obligations of fidelity and diligence are exempt therefrom.

"Another and like invidious discrimination is contained in section 13. This section makes it the duty of the commissioners to "consider and carefully revise

all the tariffs of charges for transportation of any person or corporation owning or operating a railroad in this State," and if, in their judgment, "any such charge is more than just and reasonable compensation for the service which it is proposed to be made, or if any such charge amounts to unjust and unreasonable discrimination against any person, locality or corporation," the Commissioners are to "notify the person or corporation of the changes necessary to reduce the rate to a just and reasonable compensation, and to avoid an unjust and unreasonable discrimination," and "when such changes are made," or "when none are deemed proper and expedient, the Commissioners are to append a certificate of approval to such tariff of charges, and in case such change" suggested by the Commission "shall not be made," or if "any charge, subsequently made, shall not conform thereto," said "corporation shall be held *prima facie* guilty of extortion." It is corporations, and not persons operating railroads, who are to be held *prima facie* guilty of extortion under this section, and it is corporations, and corporations only, who can be punished under its provisions, and thus it appears the act is, in its severest features, more exacting and oppressive of corporations than of persons operating railroads, the former being subjected to penalties and to punishment from which the latter are exempt."

In defining the provision of the Fourteenth Amendment, upon which we rely, this Court, through Mr. Justice BRADLEY, said:

"It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances" (Missouri vs. Lewis, 101 U. S., 31).

It seems unnecessary to emphasize the discrimination between railroad corporations and persons operating railroads. It is obvious that the statute imposes upon the one class a liability from which the other is exempt, although they must be regarded, from the

standpoint of the object of the law, as standing in "like circumstances." No possible theory of the reason of the statute can be devised, which will include railroad corporations within its legitimate purposes, while it excludes all other persons operating railroads.

The laws of Kansas provide for the purchase at foreclosure sale of the property and franchises of railroad companies, and for the exercise by the persons purchasing of all the mortgaged rights and franchises (Comp. Laws of Kansas, 1885, pp. 779, 780). These laws also *permit*, but do not require, the purchasers to form a new corporate organization. There is nothing in the law to prevent the operation of a railroad, so sold, by individual purchasers. On the contrary the law expressly authorizes this, and in point of fact such operation for a greater or less period is of frequent occurrence. Under familiar rules of construction the operation of the statute here involved will not be enlarged by intendment so as to include individual operators of railroads. The objection that the statute discriminates in the view pointed out is, therefore, both practical and rational, and, we believe, additionally conclusive of its constitutionalty.

JOHN F. DILLON,
WINSLOW S. PIERCE, JR.,
For the Plaintiff in Error.

[17834]

March 9, '88—75.

14-205

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JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

CASE No. 218.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
PATRICK MACKEY,
Defendant in Error.

Brief and Argument of Defendant in Error.

THOMAS P. FENLON,
JOHN C. TOMLINSON,
Atty's for Defendant in Error.

Seip & Horton, Printers, Atchison, Kas.

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Brief and Argument of Defendant in Error.

This case is brought here by writ of error for the purpose of reversing a judgment rendered in the Supreme Court of the State of Kansas, which judgment affirmed a judgment of the trial court of the District Court of Atchison County, in the State of Kansas.

The action in which this judgment was rendered was an action for personal injuries received by the defendant in error while acting as an employe on an engine of the plaintiff's in error railway, in the County of Atchison, State of Kansas, through and into which county plaintiff's railway passed.

We might here suggest that no constitutional question was raised by the plaintiff in error in its pleadings in the trial court. No where does it appear from the answer of the plaintiff in error, in the trial court, that the plaintiff in error proposed to raise any constitutional question, or that the act of the Kansas legislature of 1874 operated to deprive railroad companies of their property without due process of law, and is legislation of an unequal, partial and discriminating character. The first time the question was presented was on the trial of the case, when the plaintiff in error attempted to raise a constitutional question.

The sole question that the plaintiff in error raises in this court is, whether the statutes of the State of Kansas, under which it is claimed that this action was brought, is in controvention of the federal constitution, and this is the only question that is raised by it on the record.

The first point we make, in answer to the brief of the plaintiff in error is, that the record here discloses no question of which this court has jurisdiction. The counsel of the railway company assume, in their brief, that this cause of action was based upon the statutes of Kansas, approved February 26th, 1874. The court will observe from the record here (page 2) that the declaration—called a petition under the practice in Kansas—sets forth a common law cause of action against the plaintiff company. Of course the allegations in the declaration covered a case under the special statutes of Kansas, as well as a common law cause. This being so, there is not necessarily brought before this court any question of a conflict between the state law and the federal constitution. It was an action, as will be

seen by the pleadings, based upon the negligence of the corporation, and all the allegations necessary to state a case at common law against the plaintiff for injuries inflicted upon the defendant below by the plaintiff's negligence are stated, and the verdict and judgment in the case is an affirmative response to these allegations, and this court, therefore, has no information from the record as to whether the judgment in the case was a judgment upon common law or the statutory liability, and this ought to end the case.

But as the learned counsel of the railway company has seen proper to assume that the judgment in this case was based wholly upon a cause arising under the Kansas statute, which they claim is invalid, we will submit to this court a few considerations upon this question.

The statute of Kansas in controversy is found on page 143 of the laws of Kansas, of 1874, and reads as follows:

> "Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage."

This statute was approved the 26th of February, 1874, and went into effect, by publication, March 4th, 1874, and has been the law of Kansas since that time.

Counsel for plaintiff in error, in their brief in the Supreme Court of the State of Kansas, raises a constitutional question, and the decision on that question is found in the 33d Kansas, p. 298, and

quoted in the record, p. 144. The same question has formerly been raised and decided by the Supreme Court of Kansas, in the Railroad Company vs. Haley, 25 Kan., p. 35, and, in deciding the case, the Supreme Court of Kansas, say :

> " In that case (refering to the case of Haley, 25 Kan.) it was decided, after full argument and a careful investigation of the question, that the statute was not in conflict with the 14th amendment of the constitution of the United States. Upon a re-examination of the question, we are satisfied that it was correctly decided, but we think it would be profitless to again review the authorities or enter upon a discussion of the subject."

The statute of the State of Iowa is almost identical in terms with the Kansas statute, and it is held by the Supreme Court of that state not to be in conflict with the 14th amendment to the federal constitution.

> McAunich vs. M. & M. R. Co. 20th Iowa, 338.
>
> Bucklew vs. Central Iowa Railway Co., 21st Northwestern Reporter, 103.

There are statutes in other states which it has been claimed was class legislation; for instance, certain statutes of Missouri, Pennsylvania, New Hampshire, Wisconsin, New Jersey, Connecticut, and other states which will hereafter be referred to.

The constitutionality of a statute of the State of Missouri, requiring every railroad corporation to erect and maintain fences and cattle guards on the sides of its roads, and if it does not, making it liable to double the amount of the damages, etc., was brought in question and decided

by this court in the case of the Missouri Pacific Railway Co. vs. Humes, 115 U. S., p. 512. Justice Field, in delivering the opinion of the court in that case, said:

> "The objection that the statute of Missouri violates the clause of the fourteenth amendment, which prohibits a state to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along or adjoining enclosed, or cultivated fields or uncultivated lands. There is no evasion of the rule of equality where all companies are subject to the same duties and liabilities under similar circumstances. See on this point, Barbier vs Connolly, 113 U. S. 27. and Soon Hing vs. Crowley, 113 U. S. 703."

Since this court decided the case of the Missouri Pacific Railway Company vs Humes, above quoted, the Supreme Court of Kansas has again been called upon to decide the constitutionality of the law of 1874, being the same question involved in this case. The Supreme Court of Kansas, in a recent opinion, delivered November 5th, 1887, in the case of the Atchison & Topeka Railroad Co. vs. Kohler, administrator, reported in Pacific Reporter, Vol. 15, No. 10, Dec. 15th, 1887, p. 567, seems to think that the opinion delivered by this court in the case of the Railway Company vs. Humes, 115 U. S. 512, settled the question as to the constitutionality of this law, and the Kansas

Supreme Court, in again passing upon the question, uses the following language and refers to the following reports:

> "The third and final point contended for by the plaintiff in error is, that (page 93, session laws of 1874,) which makes a railroad company liable for injuries sustained by one servant on account of the negligence of a co-employe, is class legislation, which is forbidden by both the state and the federal constitution, and is void. This question has been several times considered by this court and decided adversely, to the contention of the plaintiff in error It is settled, so far as it may be by this court, that the statute is valid. Railway Co. vs. Haley, 25th Kan. 35; Railway Co. vs. Mackey, 33d Kan. 288; 6 Pacific Reporter, 291. See also Railway Co. vs. Humes, 115 Kan. 512; 6 Supreme Court Reporter, 110."

"We cannot guild the lilly or add additional scent to the rose," and, therefore, we will not attempt to add much by argument to the force of the decisions in the Humes and other cases as applicable to the case at bar. It covers this case like a blanket. It is a clear, strong, unanswerable argument as to the power of the state government in the regulation of state legislation as to the matters which belong to state government alone. In that case the court held that the statute of Missouri, specially applicable as it was to railroad companies, and holding them liable for double the amount of actual damages, which occurred by reason of their non-compliance with the fencing law of that state, was not a law in conflict with any of the provisions of the 14th amendment of the federal constitution. That it was a question whether the police power of

the state was wholly and exclusively a state and not a federal question. The counsel for the Railroad Co. here tried to distinguish between the Humes case and this one, but their distinction, or attempt at distinction, is a very weak one. In their brief here they now approve of the decision in the Humes case, but when it was before the courts of Missouri and this court, they as vigorously asserted its unconstitutionality as they now assert the unconstitutionality of the Kansas statute of 1874.

We are unable to see, if the law of Missouri was not in conflict with the provisions of the 14th amendment to the federal constitution, subjecting the railroad companies in Missouri to severe penalties under its law, how it can now be maintained, in the face of this decision, that the statute of Kansas, which regulates the liability of railroad companies to their employes, can be held to be unconstitutional. Surely, if any question can be said to be definitely settled, it is the question of the power of the state government to regulate and control all the mere police matters within their boundaries in accordance with their own conception of public duty and policy.

See—

State vs. Zeibold, et al., Vol. 8, No. 10, p. 273, Supreme Court Reporter.

Although it may be asserted that there are only two states in the union that have legislative enactments in derogation of the common law, which makes a master liable to a servant for the negligent acts of a fellow servant, we wish to call the attention of the court to several kindred statutes where many states of the union have passed upon the

identical question which is involved in this case. The legislature of the State of Kansas saw fit to pass an act, in 1874, which is called in question in this case, increasing the liability of railway companies, in addition to those existing at common law. The legislature of Pennsylvania, by an act of date April 4th, 1886, passed an act limiting the liability of railroad companies in cases where liability existed at common law. The act of the legislature of Pennsylvania reads as follows:

> "When any person shall sustain personal injuries or loss of life, while lawfully engaged or employed on or about roads works depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe, provided that this section shall not apply to passengers."

The constitutionality of this act of Pennsylvania was directly brought in question, and was the only point decided in the case of—

> Kirby vs. Penn. Railroad Co., 76 Penn. State, 506.

Chief Justice Agnew, in delivering the opinion of the court on page 508, says:

> "Is this a valid law? Had the legislature the power to pass it? The case of the plaintiff evidently falls within its terms. The propriety of the law is not a question before us. If the legislature had the constitutional power to pass it, repeal is the only mode of annuling it. It may be conceded that the natural rights of men, among them that of personal security, are guarded by

the bill of rights, and 'that all courts shall be open, and every man for an injury done him, in his lands, goods, person and reputation, shall have remedy by due course of law. and right and justice administered without sale, denial, or delay' But in what respect does this law trench upon this guaranty, or indeed on any other in the constitution? The person to be affected by it must be one lawfully engaged or employed on or about the road, &c. To be thus engaged. he must be there by his own consent. He is therefore voluntarily there, to perform some act or business connected with the road or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law, which governs the relation. He is not bound to assume the relation, and when he does he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the state, as the conservator of the lives, security and property of her citizens. It is a police regulation, which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him that the legal principle of *respondent superior* shall have no place in this particular relation; that is a matter of proper policy for the good of all; those who voluntarily venture into employment alongside of the servant of a railroad company shall have just the same remedies for injuries happening in the employment that these

> have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing is cut off or struck down. The liability of the company for the acts or omissions of others though they be servants, is only an offspring of the law. The negligence which injures is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose legligence caused the injury. It is unnecessary to refer to the long line of decisions asserting the general power of legislation when forbidden in the constitution. Finding no prohibition against such a regulation of persons lawfully engaged or employed upon a railroad or its works, the section quoted of the act of 1868 in not unconstitutional."

As being specially applicable, and answering the argument made by the plaintiff in error, to the constitutionality of act of 1874, of the Kansas legislature, we call the attention of the court to the language used by the Supreme Court of New Hampshire in the case of the Boston, Concord & Montreal Railroad Co. vs. the State, 32 N. H , 215. On page 226 of the opinion referred to, the court uses this language:

> "Again, it is said that the law is partial; not applicable to common carriers generally, nor even to carriers by steam, but is confined to the case of railroads. The force of this objection is admitted. In cases where a law is made applicable to a class out of a large number, all standing substantially in the same position; but this law applies to a class, well defined, of common carriers, distinguished by the circumstance that they used,

> in their business, steam locomotives, driven at a rate of speed known in no other mode of traveling, and attended with risks peculiar to themselves, and far exceeding those of any carriers. The same reason for the provision does not apply to any other class of persons, and we think the law is free from just exception on this account."

One of the questions at issue in the case above referred to in New Hampshire was, whether a statute was constitutional which made railroad companies liable to inditement and fine in case of loss of life by reason of the negligence or carelessness of the proprietors or their servants.

The language of the court in the New Hampshire case answers part of the argument used by the counsel for plaintiff in error in the court below, and adopts the doctrine as maintained by several other courts of this country.

Counsel for plaintiff in error have contended that the act of 1874, of the legislature of Kansas, prohibits railroad companies from setting up as a defense contributory negligence on the part of the injured employe. We find a good answer to this question in Judge Cooley's work on constitutional limitations, to which we will hereafter refer, but, as exactly in point, we call the attention of the court to a decision of the Supreme Court of Wisconsin, delivered March 3d, 1885, which is found in the 62d Wis., 411, Quackenbush, admn'r, vs. The Wisconsin & Minnesota Railroad Co. One of the questions in that case was as to the constitutionality of a statute imposing absolute liability for failure to fence railroads, when damage occurred to cattle, animals or persons on the road. Justice Cole, in delivering the opinion of the court on this question, uses the

following language :

> " The validity of this statute is challenged in an elaborate argument by defendant's counsel because it excludes contributory negligence as a defense to an action brought for damages occasioned to a person or animal by want of a fence. It is doubtless true that the provision imposed an absolute liability in such a case. It certainly excludes the defense of contributory negligence where the corporation fails to perform the duty which the statute prescribes in the first instance. This is in the nature of a penalty for the neglect of the corporation to conform to a regulation which the legislature seems to consider essential for the protection of life and property. We think there can be no doubt but such laws fall within the police power. Whether the rule of absolute liability in such a case is founded in wisdom and sound public policy it is not for the courts to decide. In the cases which have come before this court involving the validity of such laws in one aspect or another, they have been deemed as within the scope of legislative authority. Most of the cases are referred to by the Chief Justice in Curry vs. C. & N. W. R'y. Co., 43 Wis., 665, and need not be considered here."

See also—

South Western R. R. Co. vs. Paulk, 24th Ga., 356.

Cossa River Steamboat Co. vs. Barclay, 30th Ala., 120.

Thorpe vs. R. B. & R. Co., 27th Vt., 140.

As to the constitutional right of state legislatures, under the police power which belongs to them, to enact laws imposing penalties upon railroad companies, in certain cases which are not im-

posed upon other persons and corporations, we refer to the following authorities:

The state legislature of New Jersey passed an act making railroad companies and canals liable for charging more than a certain rate for transporting merchandise, and the Supreme Court of that state, in the case of The Camden & Amroy Railroad and Transportation Co. vs. Briggs, 22 N. J. Law, 623, held that the act of the legislature was not unconstitutional.

There is also a learned and lengthy opinion of the Supreme Court of New Jersey, concerning the same question, covering 210 pages, found in the 43d N. J. Law, p. 146, State Board of Assessors, et al, vs. The Central Railroad Co., et al. This opinion was delivered in 1886, and in discussing the case the court refers to a great number of adjudicated cases in the courts of the Union.

See also—

The Inhabitants of Veazie, vs. Mayo, 49 Maine, 156.

The legislature of Missouri, in 1881, enacted a law requiring railroad companies to erect waiting rooms at railroad crossings for the convenience of the traveling public. The Supreme Court of that state held it was a proper exercise of the police power of the state.

State vs. The W. St. L. & P. R'y. Co., 83 Mo., 144.

In Illinois, in 1855, its legislature made a law requiring railroads to be fenced so as to prevent stock from getting on their tracks. The Supreme Court of that state held the law constitutional, and as a proper exercise of police regulation.

See—

Ohio & Mississippi Railroad Co. vs. Mc Clelland, 25 Ill., 123.

The legislature of Tennessee, in 1879, passed an act to prohibit the speculation in witness fees. Justice Cooper delivered the opinion of the court. He says, among other things that—

> "'The law,' [quoting it] does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class. The lien given to mechanics on the land upon which they have erected buildings, the lien of the landlord on the growing crops of his tenants, the exemption of certain articles from legal process in favor of heads of families, and a portion of his earnings in favor of the laborer, are instances of such legislation, about the constitutionality of which there never has been any doubt."

See—

3 Lea, Tenn. 376, Davis vs. the State.

Also the legislature of Massachusetts, in 1868, passed a law requiring railroad companies to erect station houses at certain places on their roads, and it was held not to be in violation of the constitution of the United States.

See—

Commonwealth vs. Eastern Railroad Co., 123 Mass., 254.

The Supreme Court of Indiana has held that it is the nature of a police regulation for legislatures to pass laws which require railroad companies to fence their roads, or to hold them liable for their failure to do so.

See—

New Albany & Salem Railroad Co. vs. Fulton, 12 Ind., 3.

It seems hardly necessary to have referred to the decisions of state courts in order to sustain the constitutionality of the act of 1874, of the Kansas legislature, but for fear that it may be contended that it was a new doctrine, peculiar to one or two states in the west, we thought best to refer to the Pennsylvania, New Hampshire, Wisconsin, and other state reports which have been quoted herein, as deciding the principles of law involved in this case. It is not a new doctrine.

The act complained in Pennsylvania, was passed in 1868.

See—

76 Penn., 506.

The decision of the New Hampshire court, 32 N. H., 226, was rendered in 1855.

Judge Cooley. in his excellent work on constitutional limitations, 5th addition, p. 482, section 390, says :

> " The legislature may deem it desirable to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulation for the general benefit, and it may be a matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for other persons engaged in some other employment. If the laws be otherwise unob-

> jectionable, all that can be required in such cases is, that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge."

And the same author, under the head of "the police power of the states," p. 717, section 581, further says:

> "But those statutes which have recently become common, and which give an action to the representatives of persons killed by the wrongful act, negligence or default of another, may unquestionably be made applicable to corporations previously chartered, and may be sustained as only giving a remedy for a wrong for which the common law had failed to make provision"

In the same volume in which the Humes case is reported, to-wit: the 115th U. S., 321, we notice another decision of this court in what is known as the Kentucky Railroad Tax Cases, and we hope we may be pardoned for quoting the syllabus, which is as follows:

> "A state statute for raising public revenue by the assessment and collection of taxes, which gives notice of the proposed assessment to an owner of property to be affected by requiring him, at a time named, to present a statement of his property, with his estimate of its value, to a designated official charged with the duty of receiving the statement; which fixes time and place for public sessions of other officials, at which this statement and estimate are to be considered, where the official valuation is to be made; and when and where the party interested has the right to be present and to be heard, and which affords him opportunity, in a suit at

law for the collection of the tax, to judicially contest the validity of the proceedings, does not necessarily deprive him of his property without 'due process of law,' within the meaning of the fourteenth amendment to the constitution of the United States."

"A state law, for the valuation of property and the assessment of taxes thereon, which provides for the classification of property, subject to its provisions into different classes; which makes for one class one set of provisions, as to modes and methods of ascertaining the value, and as to right of appeal, and different provisions for another class as to those subjects; but which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it 'equal protection of the laws,' within the meaning of the fourteenth amendment to the constitution of the United States."

We also notice that the Supreme Court of Kentucky, in the case of The Owensburg & N. R'y. Co. vs. Davis Co., decided January 22d, 1887, reported in the Southwestern Reporter, Vol. 3, p. 164, in referring to a question similar to the one involved in the Kentucky Tax Cases, uses the following language, which we take the liberty to quote from the syllabus:

"'Equal protection.'"

"Nor is the act repugnant to the provisions of that amendment guaranteeing to all persons the equal protection of the law, by reason of the fact that, in the legislation of Kentucky on the subject, railroad property, though called 'real estate,' is classed by

itself, as distinct from other real estate, such as farms and city lots, and subject to different means and methods for ascertaining their value for purposes of taxation, and differing as well from those applied to the property of corporations, chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies."

The Supreme Court of the United States in a recent decision, rendered January 17th, 1887, Hayes vs the State of Missouri, Vol. 7, Supreme Court Reporter, p. 350, holds that the statute of Missouri, providing that in all capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to jurors, and in such cities shall be allowed fifteen, does not deprive one indited for murder in the criminal courts of St. Louis, a city of over 100,000 inhabitants, of the equal protection of the laws enjoined by the fourteenth amendment to the constitution of the United States.

Justice Field, in delivering the opinion, says :

"The fourteenth amendment to the constitution of the United States does not prohibit legislation, which is limited either in the object to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier vs. Connolly, speaking of the fourteenth amendment: 'Class legislation, discriminating against one and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all

> persons similarly situated, is not within the amendment.' 113 U. S., 27, 32, and 5 Sup. Ct. Rep., 357."

We have understood that the plaintiff in error would contend that the act of 1874 is unconstitutional because it creates an inequality of burdens and denies the equal protection of the laws between companies and individuals operating railroads. We cannot see how there could be any possible reason for counsel for plaintiff in error taking such a position. A railroad company would still be a railroad company, even if owned and operated by an individual, just the same as if it was owned, controlled and operated by a powerful corporation.

It would probably be appropriate to call the court's attention again to the statutes of 1874, of the state of Kansas, and the act of the legislature of Missouri, of 1875, which this court said, in the case of The Mo. Pac. R'y. Co. vs. Humes, 115 U. S. p. 512, was not in violation of the fourteenth article of amendment of the constitution of the United States.

The court will notice a similarity between the wording of the two acts.

The statute of Kansas, of 1874, in controversy, reads as follows:

> " Every railroad company organized or doing business in this state, shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage."

The statute of Missouri, of 1875, which was called in question in the Humes case, reads as follows:

"Every railroad corporation formed or to be formed in this state, and every corporation formed or to be formed under this chapter, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein to be hung, and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and until fences, openings, gates, and farm crossings, and cattle guards as aforesaid, shall be made and maintained, such corporation shall be liable *in double the amount of all damages* which shall be done by its agents, engines, or cars, to horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or enclosures, *occasioned in either case by the failure to construct or maintain such fences or cattle guards.* After such fences, gates, farm crossings, and cattle guards shall be duly made and maintained, such corporation shall not be liable for any such damages unless negligently or wilfully done. Session laws of 1875, p. 131."

The legislature of the state of Kansas, chapter 104 of the compiled laws of Kansas, of 1885, p. 920, has adopted rules for the construction of the statutes. The thirteenth rule reads as follows:

"Thirteen. The word 'person' may be extended to bodies politic and corporate."

This law was passed by the Kansas legislature October 31st, 1868.

The Supreme Court of Illinois, in the case of The Ohio & Mississippi Railroad Co. vs. McClelland, 25 Ill., 129, in speaking of corporations, says:

> "When such bodies accept their charters, it is upon the implied condition that they are to exercise their rights, subject to the power of the state to regulate their actions, as it may individuals. We are aware of no single instance, in which the legislature has, in granting such charters, prescribed the mode in which they shall execute or perform their agreements, or shall become liable. as common carriers, or from damages resulting from negligence or otherwise. Yet, they have, at all times, been required to conform to the general laws of these and other subjects. When brought into being, in contemplation of law, such a body becomes, for most purposes, a person and a subject of the states."

It seems, of late years. that all conceivable ideas are entertained in regard to the fourteenth amendment to the contitution, and where there is the least shadow, or the most remote idea that a litigant can reach this court to have the fourteenth amendment construed, he does so, and Justice Field, in the Humes case, speaking of the matter, says:

> "That there exists some strange misconception of the scope of this provision, as found in the fourteenth amendment. It seems, (as he states, quoting Justice Miller, in Davidson vs. New Orleans, 96 U. S., 97,) to be looked upon 'as a means of bringing to the

> test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision."

Defendant in error contends that the judgment of the Supreme Court of Kansas should be affirmed; that there is no constitutional question raised by the pleadings under section 709, revised statutes of the United States; and further, that if such a question is raised by the pleadings, the act of the legislature of Kansas complained of, does not operate to deprive railroad companies of their property without due process of law, and is not legislation of a partial or discriminating character. The questions involved have long since been settled by this court, and this case was brought on appeal by plaintiff in error from the Supreme Court of Kansas, to this court, for the purpose of delay.

It appears by the record in this case, p. 140, that the judgment was rendered in the trial court on the 28th of June, 1884. As we have seen before, the only question which the counsel claim to have here is the question of the constitutionality of the act of the Kansas legislature of 1874.

In view of the repeated decisions of the court upon exactly similar questions, it is inconceivable that the learned counsel of the railroad company could have been in doubt as to the question. They must have known—*did* know—what the decisions of this court were on this precise question, so it must

be evident that this case was brought to this court frivolously and for vexation and delay, and damages therefore should be allowed under the 23d rule of this court.

See numerous cases cited under rule 23, p. 665, Desty's Federal Procedure, 6th Ed.

If there ever was a case where this rule should be applied in its strictest sense, it is here.

In Prentice vs. Pickersgill, 6th Wall., 511.
In Campbell vs. Wilcox, 10th Wall., 421.

In Pennywit vs. Eaton, 15 Wall., 382, the rule of damages for delay was applied, and these cases, in our judgment do not call for the application of the rule as strongly as the case at bar. Here is the Missouri Pacific Railway Co., one of the wealthiest corporations in the Nation, on the one side, and a poor, common fireman on an engine in its employ, on the other. The latter's case has been adjudged to be a legal and just one. By reason of its wealth and power, this corporation, in the face of and with the knowledge of numerous decisions of this court, settling the only question raised, has thus vexatiously kept this poor man out of the fruits of his judgment for nearly four years. As we have said, if ever there was a case where the rule should be enforced, this is the case.

The plaintiff in error knew that the statute of Kansas was not in controvention of the fourteenth amendment to the federal constitution, and, knowing so, it has, because it had the power and wealth, delayed the collection of this judgment by the writ of error to this court and the *supersedeas* bond given to stay the execution.

If this rule, number 23, means anything, it means that the railroad company should pay the penalty prescribed by the rule.

THOMAS P. FENLON,
JOHN C. TOMLINSON,
Atty's for Defendant in Error.

March 7th, 1888.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs

PATRICK MACKAY, No. 218
Defendant in Error.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR

THOS. P. FENLON,
JOHN C. TOMLINSON,
Attorneys for Defendant in Error.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs

PATRICK MACKAY, No. 218
Defendant in Error.

ADDITIONAL BRIEF OF DEFENDANT IN ERROR

Not having received brief of plaintiff in error until after ours was prepared and printed, we beg to submit a few additional remarks in the case.

In answer to the plaintiff's assertion that the cause of action in this case was based solely on the negligence of his fellow servant, the engineer, we refer the court again to the declaration itself, contained on page 2 of the record, and assert again that it charges as well a common law action as an action under the special statute of Kansas of 1874; and therefore we reiterate, notwithstanding what the trial judge may have said to the jury below, or what the Supreme Court of Kansas may have said in discussing the constitutionality of the act of 1874, that the record here in this court does not disclose that there was any Federal question in the case and necessary to its determination. As was shown in the brief filed some years ago, to dismiss this writ of error, this court has given out no uncertain voice on this question. See Knox vs Exchange Bank, 12 Wall. 379 In 4 Wall., 177, the court held that "If it appears from the record that the court might have decided the case on some other ground, this court has no jurisdiction." In this case Mr. Justice Miller said, "If the record does not show that they (the laws of the State) were necessarily drawn in question, this court can not take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument."

In 14 Howard, 149, this court held that "it must be that such a question was necessarily involved in the decision, and that the State Court would not have given judgment without deciding it." The same question is decided in 16 Peters, 625, and 16 Wall, 185.

In Rector vs Ashly, 6 Wall, 142, it is laid down that "if the judgment can be sustained on other grounds than those which are of Federal cognizance, this court will not reverse it, though a Federal question may also have been decided therein, and decided erroneously."

In Murdock vs the City of Memphis, Justice Miller speaking for the court, says, "any matter or issue adjudged by the State Court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question, the judgment must be affirmed."

In Moore vs Miss., 21 Wall, 638, the Chief Justice, speaking for the court, said, "To give us jurisdiction, it must appear that such a question was necessarily involved in the decision." And in 98 U. S. Citizens Bank vs the Board of Liquidation, this court says, "Where the record shows that a Federal question was not necessarily involved, this court has no jurisdiction to review the decision of the Supreme Court of a State," and in this case the court quote with approval the language of the court in Brown vs Atwell, admr , 92 U. S., 327, as follows: "We have often decided that it is not enough to give us jurisdiction over the judgment of the State Court for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it."

In Boughton vs The Exchange Bank, 98 U. S., 142, this court held that "it had no jurisdiction to re-examine the judgment of a State court, unless the record shows affirmatively, or by fair implication, that a Federal question necessary to a determination of the cause is involved."

In Bowling vs Lessner, 91 U. S., 594, it is held that "if the case might have been disposed of in the State Court without deciding upon the constitutionality of the State law, the case here will be dismissed."

See also 10 Wall., 537, 12 Wall., 379, 11 Wall., 36, 8 Wall., 650 and 314, 16 Wall., 189.

It will be seen on an observation of the petition, page 3 of the printed record, that the following allegation was made to-wit: "That the engineer and fellow servant of plaintiff on the engine on which he was employed, named Jessie Craft, was then and there guilty of gross negligence and mismanagement, and was then and there incompetent and so known, by the defendant, its officers and agents, to be, at the time of his employment, and retained by said defendant after his employment was so known, but such incompetency was unknown to plaintiff." * * *

Here is a clear allegation of a cor ion law cause of action. This and all other allegations of the petition were denied by the answer, and the response to the issue thus made is found in the verdict of the jury, page 127 of the printed record, as follows: "We, the jury duly empaneled, charged and sworn in the above entitled cause, do, upon our oaths, find the issue for the plaintiff, Patrick Mackay, and assess the amount of his recovery at the sum of $12,000." Now, we submit that upon the allegation and answer and issue thus made up, and response thereto, there was no Federal question in the case, necessarily or otherwise, and that according to the language of 92 U. S., 327, there is nothing here to give jurisdiction to this court simply because the record shows that a Federal question was argued or presented to the State Court.

We beg to call the attention of the court to the remark of the counsel for plaintiff in error, in their brief, page 7, which is as follows: "It was conceded that the only authority for the maintenance of this action must be found in the statute of 1874. It was conceded that in the absence of this statute no cause of action against the railway company would have existed, and no recovery could have been had." (p 121.)

With due respect, we deny that any such concession was ever made by the defendant in error or his counsel, and the page referred to by counsel simply contains part of the charge of the court, wherein the court is explaining to the jury the difference between the liability at common law and the liability under the statute of 1874, but nowhere does the record show any concession such as is alleged by the counsel in their brief. And as we have seen before, by numerous decisions of this court hereinbefore referred to, this court does not get jurisdiction simply because a Federal question was argued or presented to the State Court for decision. 92 U. S., 327.

The counsel for the railroad company claim, page 11 of their brief, that the statute of Kansas of 1874 is vicious, because the liability or penalty prescribed is incurred without violation of law or infraction of duty. Suppose this to be true; if the 14th Amendment to the Federal Constitution has nothing to do with State legislation affecting any liability or penalty which State legislation may see proper to impose upon railroad companies within its limits, what has this court to do with the matter, whether the legislation of the State be good policy or bad policy, be just or unjust. The citizen, person, corporation or company owning property or doing business within a State, must look to the sense of justice in the Legislature of the State for protection to their rights and property, and to the courts of the State to protect them against any unconstitutional legislation, unless only where the Federal Constitution has inhibited the State Legislature from the exercise of any specified powers. Now, the question is here, and not raised for the first time, was it the intent and purpose of the 14th Amendment to the Federal Constitution to interfere with the State governments in the management of purely domestic affairs, or to prevent the State governments in any way from prescribing the duties, powers, penalties and liabili-

ties of railroad companies within their limits? Is there anything in the history of the submission and adoption of the 14th Amendment to show that any of the sovereign powers of the State governments were to be surrendered, except as specifically set forth in the Amendment?

This question seemed to have been set at rest by 92 U. S., 575, and the question as to what was the purpose and meaning of the 14th Amendment to the Federal Constitution settled beyond all controversy, in 16 Wall., 81, the celebrated slaughter house cases, wherein Judge Miller, speaking for the court, says: "In the light of the history of these amendments, and the prevailing purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause, (i. e., nor shall any State deny to any person within its jurisdiction the equal protection of the laws.) The existence of laws in the State where newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class, was *the evil* to be remedied by this clause, and by it such laws are forbidden." And again he says, page 81: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case will be necessary for its application to any other."

We are not aware that the Supreme Court have ever changed or modified this decision in the least. Certainly the learned counsel for the railroad company called our attention to no case wherein the force of the remarks of Judge Miller in the slaughter house cases have been in the slightest degree weakened. It follows, then, that whether the law of Kansas of 1874 be good or bad policy, just or unjust, it is a matter wholly within the power of the State, and with its action upon that subject the Federal government, in none of its branches, has anything to do.

It seems to us that the meaning, purpose and sole intention of the 14th Amendment of the Federal Constitution has been made so clear, by repeated adjudications in this court, that it is hardly permissible for counsel here to attempt to give it any other meaning than that given by this court, and we might even say barely respectful to this court. To claim now that this amendment to the Federal Constitution can be applied to any State legislation except that which seeks to deprive the colored people, of any State, of equal rights with white people therein, is to run right square in the teeth of the settled doctrine of this court on that subject, and we think, as we have said before, in our former brief, that it is high time that at least the penalty prescribed by rule 23 should be inflicted upon parties who persistently, in the face of repeated decisions of this court, raise a question so often decided and settled, and thus vexatiously delay the due course of the law.

In addition to what we have already quoted from Judge Miller, in 16 Wall., 32, referring to this amendment, Mr. Justice Strong says, in Strauder vs W. Virginia, 100 U. S., 310, "*Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discrimination against those who belong to it.*"

Upon this decision the case of the State vs Ah Chew, 16 Nev., 50, was decided. And in the 103 U. S., 370, 386, Neal vs Delaware, speaking for this court, Mr. Justice Harlan, referring to the amendment, said, "It was designed primarily to secure to the colored race thereby invested with the rights, privileges and responsibilities of citizenship, the enjoyment of all the civil rights that under the law are enjoyed by white persons."

It seems to us, therefore, that if authority can establish any doctrine, the doctrine here contended for is estab-

lished beyond all cavil and controversy. So that we conclude, on the points already discussed, 1st, that there was no Federal question necessary to the determination of this case in the courts of Kansas. And 2d, that the 14th Amendment to the Federal Constitution contains no inhibition upon the power of a State Legislature to regulate the duties, powers and liabilities of railroad companies within the State.

Under the second heading of the brief of the plaintiff in error, filed here, page 16, it is contended that "*The statute of* 1874 *can not be sustained as an exercise of the police power,*" and many authorities are quoted upon this proposition. In answer to this, all we have to say is, that what is or is not proper police power within a State is certainly a question to be finally decided by the State Supreme Court, and is not in any sense a Federal question, unless some given exercise of that power is inhibited by the Federal Constitution, which is not the case here. And the Supreme Court of our own State, in this very case, has decided that the act of 1874 is a proper exercise of the police power of the State, as has also been decided by the Supreme Court of Iowa, under a similar statute. Justice Field says, Bartemeyer vs Iowa, 18 Wall., 138, "*No one has ever pretended, that I am aware of, that the* 14*th Amendment interferes in any respect with the police power of the State. Certainly no one who desires to give that amendment its legitimate operation, has ever asserted for it any such effect; it was not adopted for any such purpose.*"

See also Barbier vs Connelly, 113 U. S., 27, 31.

County of San Matio vs R. R. Co., 17 Fed. Rep., 722, 741.

Also 101 U. S., 814.

97 U. S., 659, 25 and 32.

111 U. S., 746.

The third point made by the brief of the plaintiff in error, that the act is unconstitutional because it creates an inequality of burden, denies the equal protection of the law, has been sufficiently answered heretofore, and is entirely disposed of by this court in the case of Humes vs Missouri Pacific Railway Co., 115 U. S., 512.

On the whole case, we think we have the right to ask the affirmance of the judgment in this case, with costs, and the penalty prescribed by Rule 23.

THOS. P. FENLON,
JOHN C. TOMLINSON,
Attorneys for Defendant in Error.

24-205

FILED
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JAMES H. McKENNEY,
CLERK.

PATRICK MACKAY,

vs

THE MISSOURI PACIFIC RAILWAY COMPANY.

BRIEF ON MOTION TO DISMISS. on

In Supreme Court of U. S.

PATRICK MACKAY,

vs

THE MISSOURI PACIFIC RAILWAY COMPANY.

BRIEF ON MOTION TO DISMISS.

This is a case brought here under section 709, Revised Statutes, where it is claimed there is drawn in question the validity of a statute of Kansas, on the ground of its being repugnant to the Constitution of the United States, the decision being in favor of the validity of the State law. We move to dismiss, for the reason that there is no such question here as is contemplated by section 709.

1st. There is, in reality, no Federal question at all. As the court will see from the pleadings, the action was an ordinary, common law action by a servant against a master for negligence, the gravamen of the declaration, or petition as it is called in our practice, being that "*said defendant, by its agents, officers, servants and employes*, by gross negligence and carelessness, willfully, carelessly ran into * * the engine upon which plaintiff was employed * * without

giving any warning of it's approach by ringing the bell, blowing the whistle, or in any other manner, * * running at a dangerous and unusual rate of speed, and he was thereby, without fault of his own, injured." It is also alleged that the engineer of the engine upon which plaintiff was, was incompetent, and that the defendant company knew it, and that by his negligence the injury complained of occurred. The plea or answer is a general denial and an affirmative allegation that plaintiff's own negligence produced or contributed to the injury, to which plaintiff replied a general denial. And on these pleadings the case went to trial and final judgment in the Supreme Court of Kansas. Whilst this petition would cover a case under the special statute of Kansas of 26th February, 1874, it is also good as a common law declaration, by a servant against the master for a common law liability; and therefore, whether the statute of Kansas of 26th February, 1874, is valid or not, as a right to a recovery is not based upon it or dependent upon it, there is no question for this court to pass upon. It is true that the Kansas court did decide that this statute of 26th February, 1874, is not repugnant to the Federal constitution. But it was not upon that ground only that it affirmed the judgment of the court below. The case was tried upon the issues made by the petition, answer and reply. The counsel for defendant assuming that the case was based wholly upon the Kansas statute, raised the question of it's repugnancy to the Federal constitution, and the court passed upon that question as well as upon the multiplicity of other questions made by defendant below. But there was a cause of action set forth in the petition wholly distinct from that peculiar action given by the Kansas statute, and if the Kansas Supreme Court had held that the act of 26th February, 1874, was invalid as being repugnant to the Federal constitution, it could still have decided as it did on the common law allegation in the petition of culpable negligence of the master

—the defendant. That issue being found for the plaintiff, the judgment must be affirmed. We believe it is familiar law in this court that the decision affirming the validity of the State law must be *conclusive* of the rights of the parties litigant before this court will hold jurisdiction. In other words, that if the judgment of the State court could *in any event* be right, this court will not interfere. Assuming, for the purposes of the argument, that the Kansas statute of 26th February, 1874, is repugnant to the Federal constitution, could the petition in this case have been defeated on demurrer? If not, it follows that it sets forth a good cause of action at common law, and the issue having been found for the plaintiff, what avails it for the defendant to say that the special statute of Kansas is repugnant to the Federal constitution? The fundamental error of defendant below is the unwarranted assumption that the declaration is based wholly on the special statute, which is clearly not the case. This court said, in Knox vs Exchange Bank, 12 Wall., 379, "the judgment must give effect to some State statute, * * or the case for review here does not arise." In R. R. Co. vs Rock, 4 Wall., 177, this court held "*that if it appears from the record that the State court might have decided the case on some other ground, this court has no jurisdiction.*" In this case Mr. Justice Miller said: "If the record does not show that they (the laws of State) were necessarily drawn in question, this court can not take jurisdiction to reverse the decision of the highest court of a State upon the ground that counsel brought them in question in argument." In Lawton vs Walker, 14 Howard, 149, this court held that "it must be that such a question was necessarily involved in the decision, and that the State court would not have given judgment without deciding it." To the same effect is Mills vs Brown, 16 Peters, 625. In Smith vs Adsit, 16 Wall., 185, the same doctrine is reiterated. In Rector vs Ashly, 6 Wall., 142, it was laid down that if the judgment can be sustained on other grounds than

those which are of Federal cognizance, this court will not revise it, though a Federal question may also have been decided thereon, and decided erroneously.

In the celebrated case of Murdock vs The City of Memphis, 20 Wall, 590, in which the construction of the act of February 5th, 1867, as effecting and amending the judiciary act of 1789, unless we misapprehend the decision of the court there, as rendered by Justice Miller, it is held that if there is any "matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question, the judgment must be affirmed."

Under the pleadings and full record in this case, it must be apparent that according to the decision in Murdock vs The City of Memphis, and the other cases hereinbefore referred to, that the question as to whether the special statute of Kansas was repugnant to the Federal constitution, was not, to use the language of Murdock vs Memphis, "*of such controlling character that its correct decision was necessary to any final judgment in the case,*" for the reason, as hereinbefore stated, that the plaintiff's cause of action did not necessarily depend upon the facts that constitute a cause of action under the statute of Kansas which is claimed to be repugnant to the constitution of the United States. In Moore vs Miss., 21 Wall., 638, the Chief Justice, speaking for the court, said: "To give us jurisdiction, it must appear that such a question was necessarily involved in the decision." In Citizens Bank vs The Board of Liquidation, 98 U. S., the court says: "Where the record shows that a Federal question was not necessarily involved, this court has no jurisdiction to review the decision of the Supreme Court of a State." And in this case the court quote with approval the language of the court in Brown vs Atwell, adm'r, 92 U. S., 327, as follows: "*We have often decided that it is not enough to give us jurisdiction*

over the judgments of the State courts, for a record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the cause, and that it actually was decided, or that the judgment as rendered could not have been given without deciding it." In Boughton vs Exchange Bank, 98 U. S,, 142, this court held that "it had no jurisdiction to re-examine the judgment of a State court unless the record shows affirmatively, or by fair implication, that a Federal question necessary to a determination of the cause is involved." In Bowling vs Lessner, 91 U. S., 594, it is held that if the case might have been disposed of in the State court without deciding upon the constitutionality of the State law, the case here will be dismissed. See also 10 Wall , 537 ; 12 Wall., 379 ; 11 Wall., 36 ; 8 Wall., 650 and 314 ; 16 Wall., 189.

From these references it will be seen that by an uninterrupted current of authority, under both the judiciary act of 1789, and the act of 1867, amendatory of the judiciary act, it is established law not now to be questioned, that the Federal question raised in a case must be essential to its determination. While, as before stated, the declaration in this case undoubtedly states a cause of action under the special statute of Kansas, it also alleges a common law liability, and the verdict of the jury and the judgment of the court is an affirmative response to the allegation that the defendant's negligence caused the injury complained of, and this being so, no Federal question was necessarily involved in the case. And therefore the question as to whether the special statute of Kansas was repugnant to the Federal constitution, was not an essential question in the case. This, according to the authorities quoted, ought to be conclusive of this motion to dismiss ; but if the court on this motion will look into the merits of the decision complained of, we submit that the determination of the Supreme Court of Kansas, that the act of 26th February,

1874, is not repugnant to the Constitution of the U. S., is correct.

The question was first raised in Kansas in the case of the Missouri Pacific Railway Company vs Haley, 25 Kansas, 35, and it was there held, as in this case, that there was no conflict between the Kansas act of 1874 and the 14th Amendment to the Federal Constitution. In a recent case in Iowa, where there is a similar statute—Bucklew vs Central Iowa R. R. (Northwestern Rep. Vol. 21, No. 2, Nov. 15th, 1884,)—the validity of the statute was challenged and the statute sustained by the Supreme Court of that State. See also, on this subject, 20 Iowa, 338.

On principle, considering the circumstances that gave occasion to the adoption of the 14th Amendment to the Federal Constitution, and the conceded respective rights and powers of the respective States and the Federal Government, it seems to us impossible to believe that it was ever dreamed of that by that amendment it was intended to take from the States the right and power to regulate by their own enactments the duties and prescribe the liabilities of corporations created by their own power, or to interfere in any way with the ordinary police powers of the States. It may be true that the framers of that amendment "builded better than they knew," and that it does embrace more than its framers really intended, but neither from its language or the causes which gave rise to its adoption, can it be fairly said that there was any intention to deprive the States of the power to regulate, within their limits, what the Supreme Court of Iowa call, in Bucklaw vs Iowa Central R. R. Co., the "peculiarly hazardous business" of railroading. In what way does the act of 1874 "deny" to the Missouri Pacific Railway Company "the equal protection of the laws?" All railroad companies in or doing business in the State are alike subjected to the provisions of this law. In other words, all *persons* engaged in this "hazardous business" are equally subjected to the provisions of

this statute. As well might it be claimed that all State laws regulating the duties and fixing the liabilities of dynamite and powder companies, or defining the liabilities and duties of druggists, liquor sellers, or any other peculiar or dangerous occupations, were in conflict with the Federal Amendment. As long as all classes engaged in the same business are treated alike, they have "the equal protection of the laws." Here is a railroad "class," and because of the hazardous nature of the business, the State prescribes a certain regulation for this class, and because this enactment is confined to this class *of masters*, it is contended that it subjects them to liabilities and penalties to which other masters are not by the law subjected, and that therefore this class of masters is denied "the equal protection of the law," we presume on the ground that at common law a master was not liable for an injury to an employe caused by the negligence of a fellow servant, and as this statute creates that liability as to railroad companies, it is contended that they are denied that protection from such liability which is accorded to all other classes of masters. If this contention can be maintained, then all police power of the State over persons engaged in hazardous and dangerous occupations is gone. The Supreme Court of Kansas in deciding this question in Missouri Pacific Railway Co. vs Haley, 25 Kansas, 53, contented itself by saying, with reference to this question, "we have examined the argument and authorities upon this point, but do not think the section referred to has any application."

In the railroad tax cases, 92 U. S., 575, it is held by this court that taxation "uniform *upon the class*" upon which it operates is not unconstitutional. In other words, that the legislation of the State in the exercise of its legitimate police authority, may regulate in its discretion certain *classes of people*, and that in doing so, when it treats all of such classes alike, it can not be maintained that any one of them is denied the equal protection of the laws.

In speaking of the latter portion of the 14th amendment to the Federal constitution, Mr. Justice Miller, in the slaughter house cases, 16 Wall., 81, says: "In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause, (i. e. nor shall any State deny to any person within its jurisdiction the equal protection of the laws.) The existence of laws in the State where newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, *was the evil* to be remedied by this clause, and by it such laws are forbidden." And again he says, page 81: *We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held within the pervue of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.*"

And we submit that such "a strong case" is not now here, and that however much better the framers of this amendment builded than was their purpose, and whatever subjects this amendment may possibly be held to embrace, it can never be held to effect the power of the State Governments to regulate and control, within their own limits, the duties and liabilities of any particular class of corporations. It seems to us, from the numerous authorities quoted, outside of the reason and purpose of this amendment, that the question attempted to be made here by the defendant ought to be considered at rest. And because there is no Federal question here, this motion should be allowed and the action dismissed for want of jurisdiction.

THOMAS P. FENLON,
Attorney for Plaintiff in Error.

JNO. C. TOMLINSON,
Of Counsel.

17-205

Office Supreme Court U. S.
FILED.
APR 18 1885
JAMES H. McKENNEY.
CLERK.

UNITED STATES SUPREME COURT.

THE MISSOURI PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

against

PATRICK MACKEY,

Defendant in Error.

Writ of Error to the Supreme Court of the State of Kansas.

BRIEF OF RAILWAY COMPANY IN OPPOSITION TO MOTION TO DISMISS.

JOHN F. DILLON,
MELVILLE EGLESTON,
Attorneys for the Plaintiff in Error.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre Street, N. Y.

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UNITED STATES SUPREME COURT.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

PATRICK MACKEY,
Defendant in Error.

Writ of Error to the Supreme Court of the State of Kansas.

STATEMENT.

Mackey, the defendant in error, while in the employ of the Missouri Pacific Railway Company, plaintiff in error, as fireman, was injured in the State of Kansas in a collision, the result, as alleged in his petition or complaint, of the "negligence of his fellow servant, the engineer" (Record, p. 3). The case was tried before a jury, and a verdict was rendered in favor of the plaintiff Mackey, for the sum of $12,000. A motion for a new trial was overruled, and the defendant thereupon filed its petition in error in the Supreme Court of Kansas, which Court affirmed the judgment below. From that

judgment the Railway Company prosecutes this writ of error.

The case is brought here under R. S. § 709. It was claimed by the Railway Company that there was drawn in question the validity of the statute of the State of Kansas upon the ground of its being repugnant to the Constitution of the United States, the judgment of the State Court being in favor of the validity of the statute.

The defendant in error moves to dismiss the writ for want of jurisdiction in this Court, and to affirm the judgment of the State Court, for the reason that "if this Court has jurisdiction the question upon which its jurisdiction depends is too frivolous to need further argument."

I.

The record shows a decision of the State Court on a Federal question properly presented, and of which this Court could take jurisdiction.

The plaintiff in error claims that but for a statute of the State of Kansas, passed in 1874, there would have been no cause of action stated in the petition, and plaintiff below could not have recovered upon the facts alleged and proven; for if his injury was the result of any negligence other than his own, it was purely *as he alleged in his complaint* (p. 3), the negligence of a

fellow servant in the same common employment, from which negligence no right of action could arise.

The Statute of Kansas, of 1874, reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damage done to any employee of such company in consequence of any negligence of its agents, or by any mismanagements of its engineers or other employees, to ANY person sustaining such damage."

1. This statute is claimed by the plaintiff in error to be repugnant to the XIV. Amendment of the Federal Constitution, which provides that no State shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws."

No such liability as is imposed by this statute upon railroad companies is imposed by the State upon any other person or corporation. No such liability exists at common law.

The companies designated, comparatively few in number, are singled out from all the vast multitude of employers of labor to be subjected to this special burden and risk. Their employees are singled out from the great class of the employed to be, at the expense of their employers, the special objects of the favor of the State; to have created for their benefit a right as against their employers, which is in derogation of the common law, and to which others, though in circumstances essentially the same can lay no claim.

This, the plaintiff in error will, on the argument of this cause when it is reached, insist is to deny it the equal protection of the laws, and the Statute of Kansas

of 1874 is therefore "within the letter and the spirit of the inhibitions of the XIV amendment."

County of Santa Clara vs. R. R. Co., 18 Fed. Rep., 385.
Ex parte Virginia, 100 U. S., 347.
Ex parte Ah Fong, 3 Sawy., 144.
R. R. Tax Cases, 13 Fed. Rep., 722.
R. R. Co. vs. R. R. Commrs., 19 Fed. Rep., 690.

2. And is not to be justified as an exercise of the police power.

Cooley Const. Lim., 719 and 725, *note.*
State vs. Noyes, 47 Maine, 189.
Rorer on Railroads, 562.
People vs. Plank Road Co., 9 Mich., 307.
T. W. & W. R'y Co. vs. City of Jacksonville, 67 Ill., 37.

The case of Barbier vs. Connolly, 113 U. S., 27 (decided Jan. 5th, 1885), will on the argument be shown to be distinguishable, inasmuch as this statute does not affect alike all persons similarly situated. The classification attempted to be made is wholly artificial and arbitrary.

3. The constitutional objection was raised at various stages in the Court below: 1st, by answer (it is unnecessary under the Kansas practice to plead it specifically; it is sufficiently raised under a general denial); 2d, by motion for judgment on the pleadings; 3d, by request to the Court for instructions to the jury; by motion for judgment on the pleadings and findings of fact; by motion for a new trial; by the petition in error, and by the opinion of the Supreme Court of Kansas.

II.

The Federal Question having been raised, and having been decided against the plaintiff in error, the case must be heard on its merits.

It appears by the opinion of the State Court that the decision of the constitutional question was deemed necessary to the determination of the case (see opinion. Record, pp. 41, 42.).

Whether this question was necessary to a determination of the case, will not be examined by this Court on a motion to dismiss. It belongs to the final and regular hearing.

When the record shows a decision of the State Court on a federal question properly presented, and of which this Court could take jurisdiction, even when it shows also the decision of a local question, the writ of error *will not be dismissed on motion in advance of the hearing.*

"The jurisdiction has attached, and we must hear the case on its merits."

Murdock vs. City of Memphis, 20 Wall, 628.
Rector vs. Ashley, 6 Wall., 142.

"The counsel of both parties are entitled to be heard when the record shows the existence of a decision which gives us jurisdiction, on the soundness of that decision, on its sufficiency to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the federal question was erroneously decided.

Railroad Co. vs. Maryland, 20 Wall, 645.

The only question, therefore, that can be considered on this motion, is the question of the jurisdiction of this Court, and not how that jurisdiction ought to be exercised.

We conceive it to be wholly improper to discuss at this time the validity of the Kansas statute. For such discussion, the mode of presentation prescribed for this class of motions affords no adequate opportunity, and is altogether insufficient and inappropriate. To attempt to dispose of an important constitutional question without the benefit of oral argument in open Court would be to show ourselves inappreciative of the gravity of the issue, and lacking in a sense of what is due to the Court before which such questions are brought for their final and solemn adjudication.

We prefer to follow the established practice, and to argue this cause in the usual and regular way, before the bar of this Court; and we decline to discuss the constitutional question in advance of the hearing to which we conceive ourselves to be justly entitled.

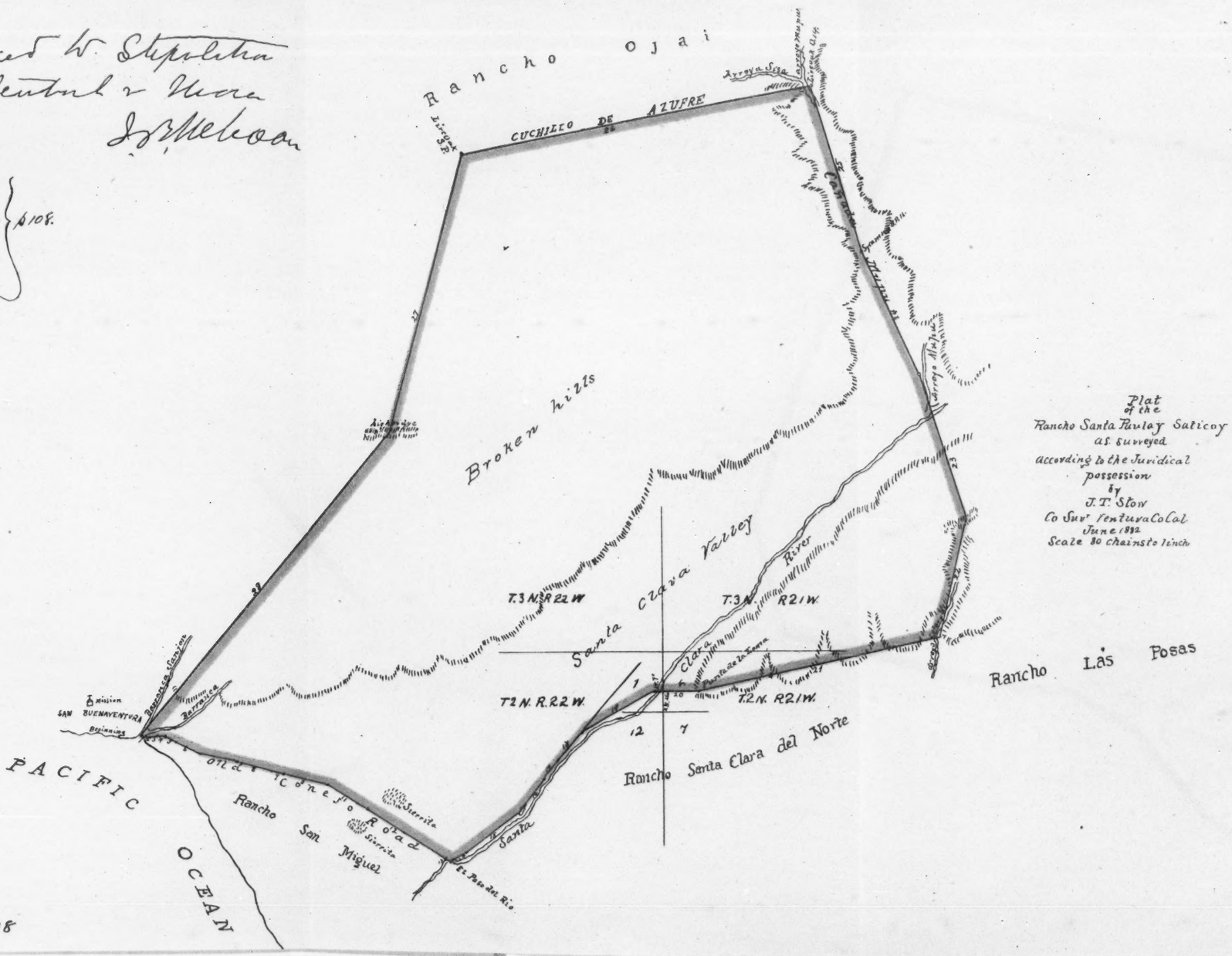
Upon principle and authority, therefore, it is respectfully submitted that the cause should take the ordinary and proper course, and that the motion of the defendant in error must be denied.

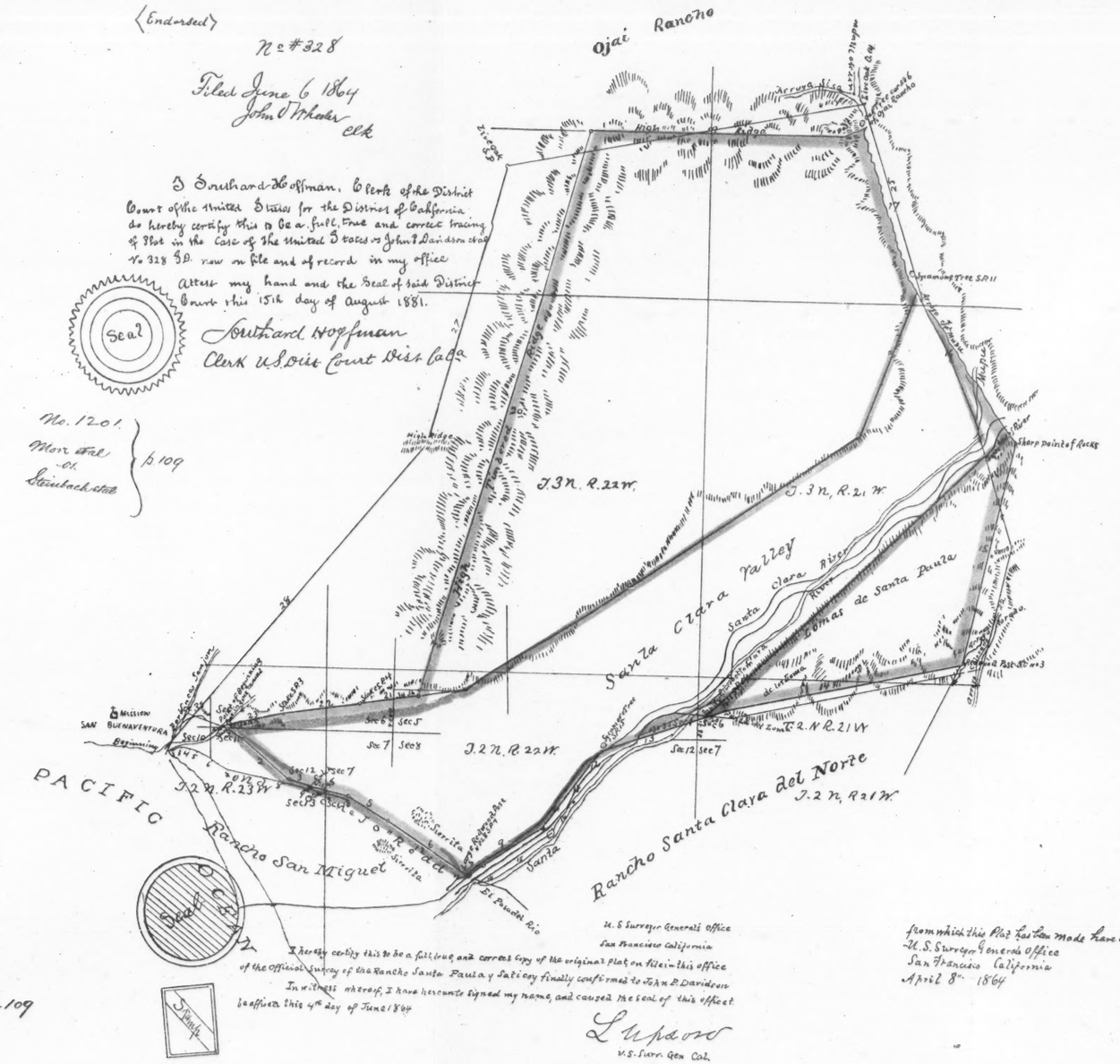
JOHN F. DILLON,
MELVILLE EGLESTON,
For the Railway Company.

April 17, '85.

annexed to Stipulation
in Steinbach v Moore
D. B. McKeoan

No. 1201.
Morse et al
vs.
Steinbach et al. } $108.


Rancho Ojai
CUCHILLO DE AZUFRE
Broken hills
Santa Clara Valley
Santa Clara River
T. 3 N. R. 22 W.
T. 3 N. R. 21 W.
T. 2 N. R. 22 W.
T. 2 N. R. 21 W.
Mission SAN BUENAVENTURA Beginning
Rancho San Miguel
Rancho Santa Clara del Norte
Rancho Las Posas
PACIFIC OCEAN
El Rincon Rio
Santa Clara
Plat of the Rancho Santa Paula y Saticoy as surveyed according to the Juridical possession by J. T. Stow Co Surv Ventura Co Cal June 1892 Scale 80 chains to 1 inch


Ojai Rancho
Santa Clara Valley
Santa Clara River
Rancho Santa Clara del Norte
T.2 N. R.22 W.
T.3 N. R.22 W.
T.3 N, R.21 W.
T.2 N. R.21 W.
T.2 N. R.23 W.
Rancho San Miguel
PACIFIC
OCEAN
MISSION SAN BUENAVENTURA
Beginning
Sec 6
Sec 7
Sec 8
Sec 12
Sec 13
Sharp Point of Rocks
Sierra Madre
Sierra Pinta
Sierra Topa Topa
Sierra Santa Clara
El Pandol Rio
Santa Clara
Rancho Santa Paula y Saticoy
Rancho Las Tomas de Santa Paula
Rancho Santa Paula y Saticoy
Rancho Ojai
Rancho Sespe
Rancho Simi
Rancho Las Posas
Rancho Calleguas
Rancho Guadalasca
Rancho Las Virgenes
Rancho Triunfo
Rancho Conejo
Rancho Las Salinas
Rancho Nogales
Rancho Cañada de Santa Rosa
Rancho Cañada de Santa Rosa
Rancho Las Llajas
Rancho Las Llajas
Rancho Las Posas
Rancho Calleguas
Rancho Guadalasca
Rancho Las Virgenes
Rancho Triunfo
Rancho Conejo
Rancho Las Salinas
Rancho Nogales
Rancho Cañada de Santa Rosa

No. 120
Morretal
et
Steinbach, etal
} p. 147

PLAT

of the

LANDS of Ex Mission SAN BUENAVENTURA

finally confirmed to

MANUEL A. RODRIGUEZ DE POLI

Compiled from approved field notes of Surveys on file in the office of the U. S. SURVEYOR GENERAL in conformity with the decision of the HON. SECRETARY OF THE INTERIOR dated June 7th 1874

Containing

TRACT No 1 4789.72/100 Acres
" " 2 1003.1/100 "
Aggregate 4882.82/100 "

Scale 80 chs to 1 inch
Respective Variation 14° 0' to 16° E.

Approved August 24th 1874
S. S. Burdett
Commissioner of the General Land Office

Boundaries of the Lands of Ex Mission San Buenaventura

TRACT No 1

No	Course	Dist	No	Course	Dist	No	Course	Dist
1	N 22 3/4 W	9.77.22	25	S 63 3/4 W	76.50	Beginning on the Point of Mile Boundary		
2	S 30 1/2 E	36.12	26	S 75 W	6.00	69	N 67 E	7.50
3	N 68 E	7.00	27	N 16 1/2 W	19.25	70	N 3 W	3.50
4	N 70 E	15.00	28	N 22 3/4 W	23.00	71	S 87 W	7.50
5	N 33 3/4 E	17.21	29	N 16 1/2 E	5.00	72	S 3 E	3.50
6	N 62 E	71.27	30	N E W		Beginning on the Mile Boundary		
7	N 67 1/2 E	32.00	31	N 39 E	41.00	73	N 79 W	11.00
8	S 38 1/2 E	24.00	32	N W	8.00	74	S 11 W	4.75
9	S 14 1/2 W	8.00.00	33	N 28 E	5.00	75	S 79 E	11.00
10	S 84 W	14.00.00	34	N 44 1/2 E	20.00	76	N 11 E	16.76
11	S 59 1/2 W	109.00	35	N 40 1/2 E	23.00	Commencing at the Mile Boundary		
12	S 60 1/2 W	115.00	36	N 24 1/2 E	8.00	77	N 74 W	11.50
13	S 67 1/2 W	35.00	37	N 23 E	3.50	78	N 30 W	4.46
14	S 33 W	46.00	38	S 86 E	17.00	79	N 70 1/2 W	4.00
15	S 81 W	96.33	39	N 50 E	29.00	80	S 47 1/2 W	4.50
16	S 81 1/2 W	10.76	40	N E E	15.00	81	S E E	11.50
17	S 72 1/2 W	103.96	41	N 50 E	3.00	Commencing at the Mile Boundary		
18	N 77 W	52.00	42	N 40 1/2 E	132.00	82	N 10 E	17.00
19	N 87 1/2 W	55.00	43	North	34.00	83	S 80 W	17.00
20	S 49 W	2.00	44	West	20.00	84	S 10 W	17.00
21	S 27 W	23.00	45	N 47 1/2 E	156.00	85	N 80 W	17.00
22	S 48 1/2 W	7.00	46	N 31 W	42.00			
23	S 44 W	N 44	47	S 59 1/2 W	35.00			
24	N 68 1/2 W	39.61	48	N 67 1/2 W	182.00			

TRACT No 2

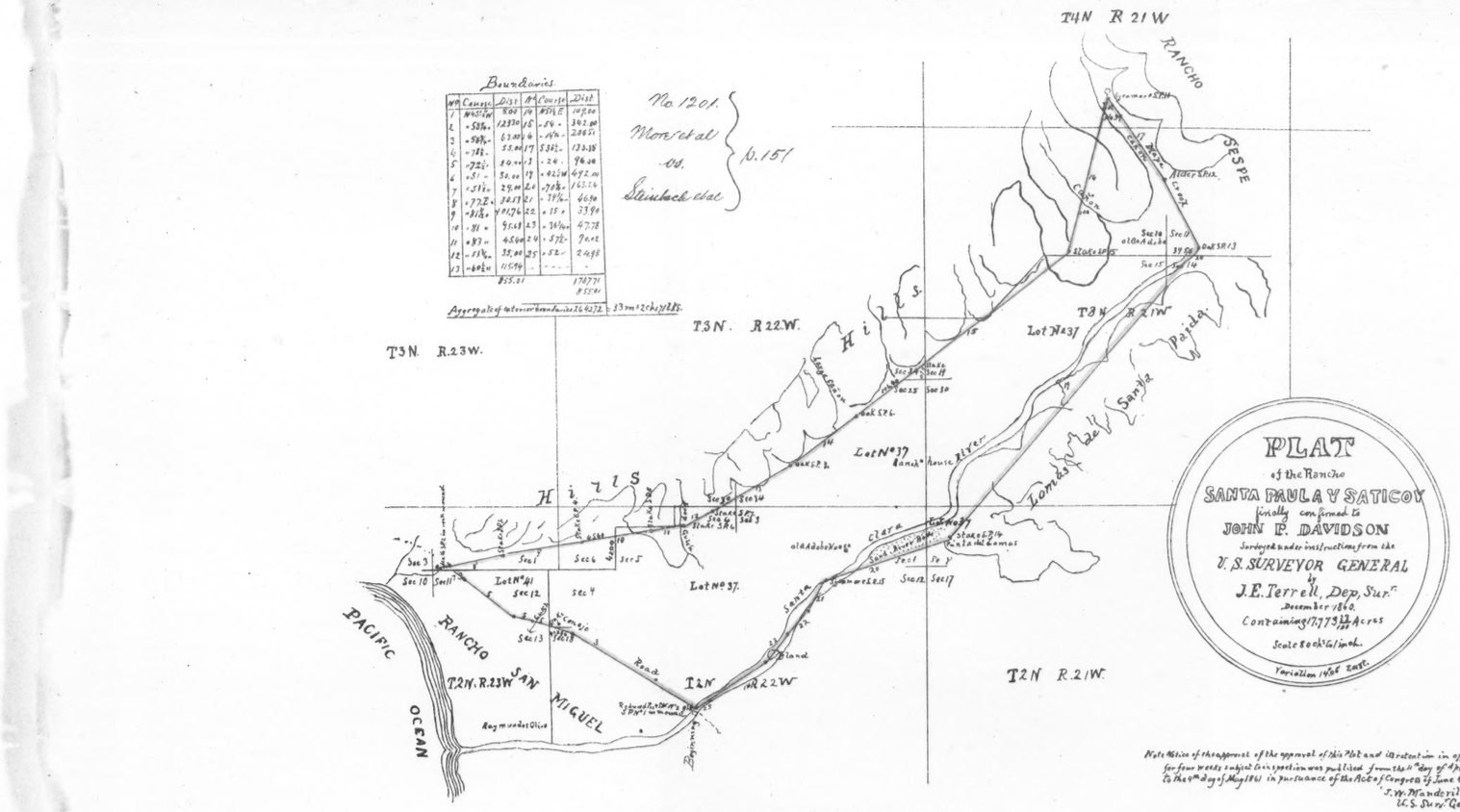
1	S 21 1/2 W	23.00
2	N 42 1/2 W	80.00
3	N 17 W	72.55
4	N 49 W	50.00

The Field notes of the Survey of Ex Mission San Buenaventura from which this plat has been made, have been examined and approved and are on file in this office:
U. S. Surveyor Generals Office
San Francisco California
August 5th 1874

L S

Just. J. Stratton
U. S. Surv. Gen. Cal.

Page 147



Bearings

No	Courses	Dist	No	Courses	Dist
1	N 45¼ W	8.00	10	N 57¼ E	10.00
2	- 52½ -	123.30	15	- 54 -	302.00
3	- 59½ -	63.00	6	- 44 -	208.51
4	- 74½ -	53.00	17	S 35½ -	133.38
5	- 72½ -	80.00	3	- 26 -	96.00
6	- 51 -	30.00	19	- 9 ¼ W	492.00
7	- 51½ -	29.00	20	- 70¾ -	162.24
8	- 72¾ -	30.00	21	- 79½ -	66.00
9	- 81¾ -	N 01.74	22	- 15 -	33.00
10	- 81 -	57.65	23	- 36¼ -	47.78
11	- 83 -	46.60	24	- 57½ -	9.00
12	- 73¾ -	35.00	25	- 52 -	2.498
13	- 60¾ -	11.50	-	- - -	
		855.01			1777.71
					855.01

Aggregate of exterior boundaries 24.4272 = 33 m 2 ch 72 lks.

No 1201. Monrestal et al. vs. Steinbeck et al. } D. 151

PLAT
of the Rancho
SANTA PAULA Y SATICOY
finally confirmed to
JOHN P. DAVIDSON
Surveyed under instructions from the
U. S. SURVEYOR GENERAL
by
J.E. Terrell, Dep. Sur.r
December 1860.
Containing 17,779 12/100 Acres
Scale 80 ch to 1 inch.
Variation 14° 0' East.

Note Notice of the approval of the approval of this Plat and its retention in office for four weeks subject to inspection was published from the 4th day of April to the 4th day of May 1861 in pursuance of the Acts of Congress of June 14th 1860

J. W. Mandeville
U. S. Surv. Gen'l Cal.

The field notes of the Rancho of Santa Paula y Saticoy from which this plat has been made and has been examined and approved and are on file in this office
U.S. Surveyor Gen'ls office
San Francisco California
February 25th 1861.

J. W. Mandeville
U. S Surv Gen'l Cal.

Exd

A full True and correct Copy of the Original plat on file in this Office
U.S. Surveyor Generals Office
San Francisco California
October 25th 1870

Sherman Day
U. States Surv Gen'l Cal.

Page 151.

No 1201.
More et al.
vs.
Steinbach et al.
p. 141

PLAT
of the
LANDS OF EX-MISSION BUENAVENTURA
finally confirmed to
MARIA A. RODRIGUEZ DE POLI.

Surveyed in accordance with the final Decree of the U.S. District Court dated 1 Oct. 15th 1864 and located from Records in the Office of the
U. S. SURVEYOR GENERAL
and by
Geo. H. Thompson. Dep. Sur
as follows:

Tract No 1 (A) containing	9935.75	Acres
" " 2 (B) "	883.50	"
" " 3 "	113.44	"
Total	10,870.69	

Scale 120 Chains to 1 Inch
Variation 20° 5 E and 15° 30 E.

References

Lines colored Red show the Boundaries of Ex Mission as Confirmed by old monuments and Officials

D	Rancho El Arroyo, finally confirmed to	Teodoro Arellanes	
E	" Santa Ana "	Apolinario et al.	
F	" Cañada de San Miguelito "	Juan E. de Rodriguez	
G	" Cañada Larga "	Joaquina Alvarado	
H	" San Miguel "	Raymunda Olivera & Felipe Serrano	
I	" Santa Rosa y Sobrante "	John L. Davidson	
J	" Santa Clara del Norte "	John Sanchez	
K	" Los Prietos "	Miguel de la Guerra y Noriega	
L	" Calleguas "	Gabriel Ruiz	
M	" Guadalasca "	Isaac Worsley	
n	Three Lots	El Ayuntamiento de Santa Barbara	
o	One Lot	Fernando Tico	
N	Location of Rancho Simi, in accordance with Decree, and Official Survey of Exterior Lines of	Rancho Simi, as Confirmed to Plaintiff by Decree of District Court.	

Boundaries

No.	Course	Distance	No.	Course	Distance	No.	Course	Distance
Tract No 1			18	S 24° W	18.50	34	S 24° E	361.00
1	N 19½° E	19.80	19	" 2° W	9.50	35	" 19° W	193.00
2	" 84° E	12.50	20	" 85°	3.00	36	" 19° W	480.00
3	" 33½° E	76.00	21	" 39°	41.50	37	" 49° E	80.00
4	" 84° E	47.00	22	" 22½° E	57.50	38	" 2° E	69.80
5	" 44° E	68.00	23	" 2° E	411.00	39	" 2° W	98.00
6	" 34½° E	99.75	24	" 10° E	463.75	40	N 89½° W	113.00
7	" 44° E	7.00	25	" 44° E	98.60	41	" 89½° W	160.00
8	" 34° E	16.00	26	" 2° E	5.00	42	" 89½° W	1779.00
9	" 17° E	24.00			2153.76	43	" 89½° W	1609.77
10	" 17° E	24.00			2.60 x 82.50	44	S 89½° W	2101.50
11	" 17° E	18.00	Aggregate		21,197.26	45	" 89½° W	2.60 x 82.50
12	" 34° E	16.00	as within 97.43		20 Links	46	" 89½° W	2101.50
13	" 34° E	16.00	Tract No 2.			47	" 89½° W	1609.77
14	" 34° E	24.00	1	S 84° E	4.25	48	" 89½° W	1779.00
15	" 34° E	17.00	2	" 69°	21.00	49	" 89½° W	13.00
16	" 34° E	17.00	3	" 84° E	20.50	50	" 89½° W	24.00
17	" 34° E	20.00	4	" 48½°	33.50	51	" 89½° W	24.00
18	" 34° E	16.00	5	" 33°	14.00	52	" 89½° W	24.00
19	" 34° E	17.00	6	" 84° E	33.00	53	" 89½° W	24.00
20	S 89½° E	240.00	7	" 84° E	10.00	54	" 89½° W	24.00
21	" 89½° E	16.00	8	" 44½°	7.00	55	" 89½° W	24.00
22	" 89½° E	20.00	9	" 44°	23.00	56	" 89½° W	24.00
23	" 89½° E	60.00	10	" 84° E	2.00	57	" 89½° W	24.00
24	" 89½° E	160.00	11	" 33½°	2.50	58	" 89½° W	24.00
25	" 89½° E	160.00	12	" 33½°	2.00	59	" 89½° W	24.00
26	" 89½° E	160.00	13	" 22½°	8.00	60	" 89½° W	24.00
27	" 89½° E	160.00	14	" 84° E	4.00	61	" 89½° W	24.00
28	" 89½° E	160.00	15	" 84° E	2.00	62	" 89½° W	24.00
29	" 89½° E	160.00	16	" 84° E	2.00	63	" 89½° W	24.00
30	" 89½° E	160.00	17	" 84° E	2.00

No. 1201.
Morr et al
vs.
~~Steinbach et al~~
D. 213.

No 550

Exhibit J

Diagram under
act of Jurdical
possession

John P. Darison, et al

Santa Paula y Yatiery

Filed in Office Feby 3
1853
Geo. Fisher

Suppposed Map

N
W E
S

Azufre

E N E
300 cordels

arroyo de Jesus

N. W
arroyo de Nuestra 200 cordels

Rio santa clara

arroyo de Nupsú

N. E
55 cordels

arroyo colorado

East
130 cordels

East
26 cordels

N E 1/4 E
155 cordels

Rio santa clara

North
66 cordels

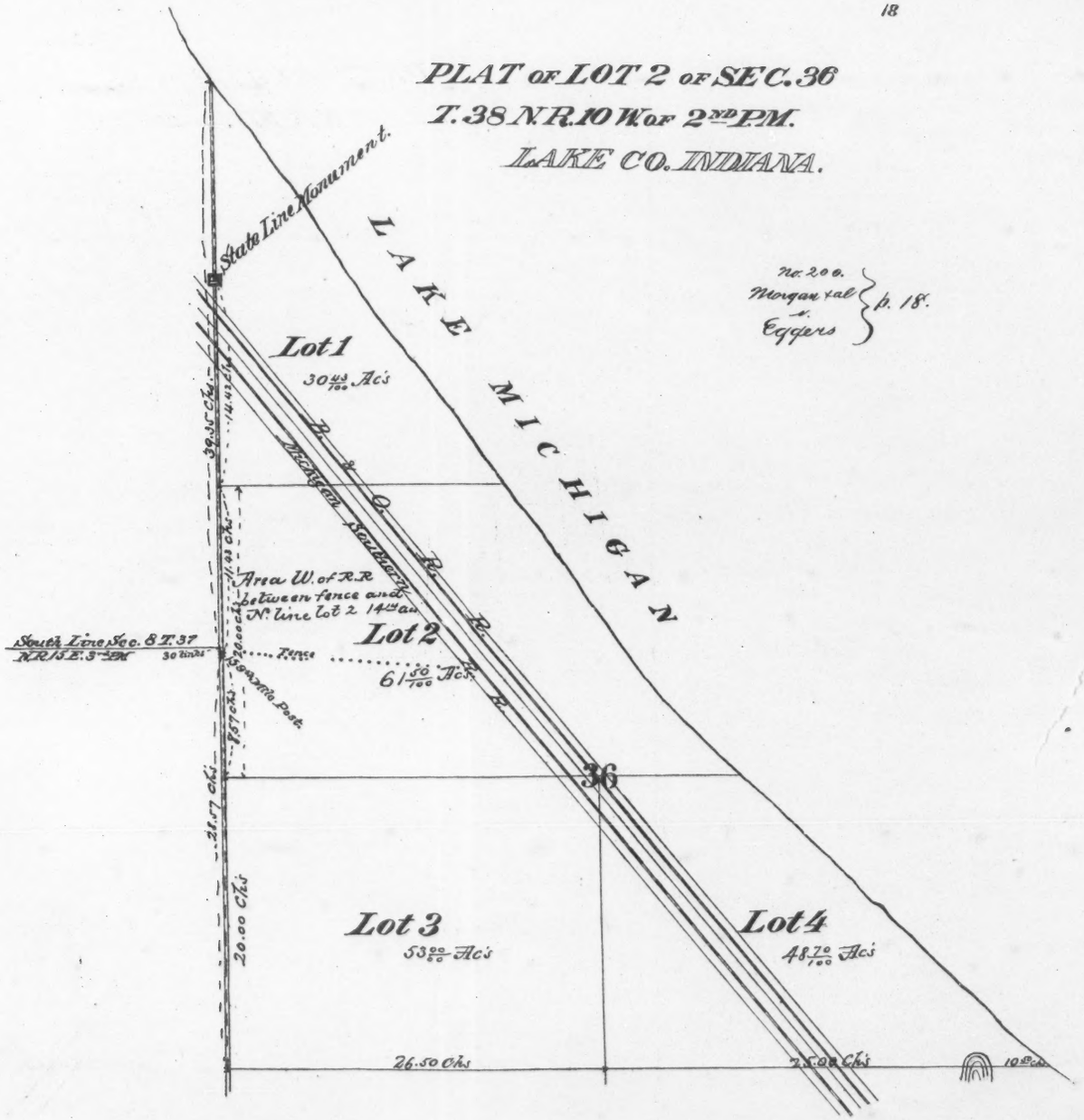
E 1/4 S
104 cordels

Barranca

104	
155	
130	
26	
55	
55	
200	
300	
60	
175	
300	
1276	cordels

Length of boundary lines

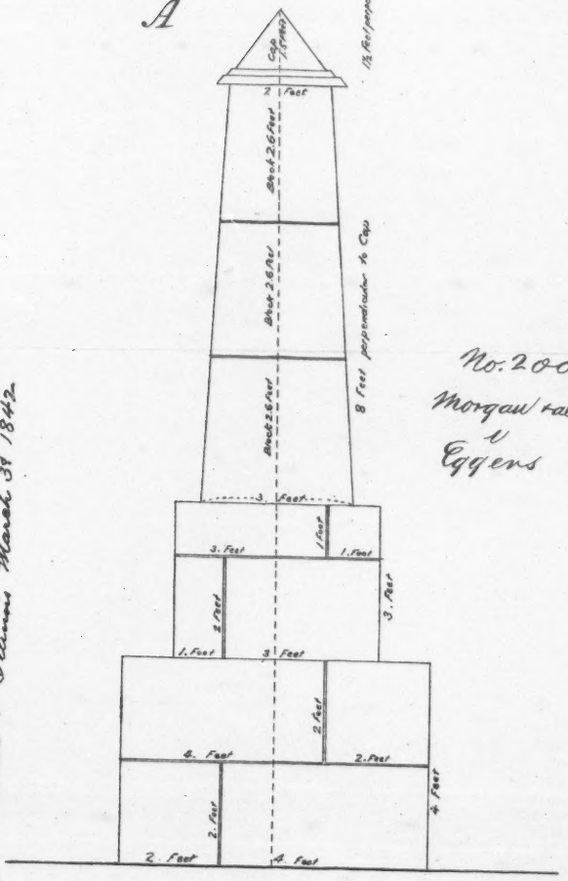
PLAT OF LOT 2 OF SEC. 36
T. 38 N. R. 10 W OF 2ND P.M.
LAKE CO. INDIANA.



Copy sent to the Governor of the State of Indiana × Illinois March 31st 1842

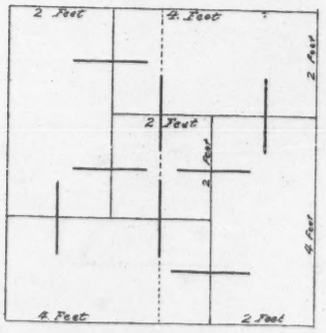
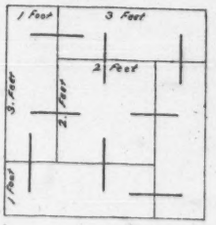
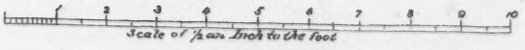
ELEVATION

A



No. 200.
Morgan et al
v
Eggens
} p. 19

PLAN
of the
Principal Base



Plan
of the Second Base or Plinth